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## Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the *Strickland* Prejudice Requirement

Jeffrey L. Kirchmeier

CUNY School of Law, [kirchmeier@law.cuny.edu](mailto:kirchmeier@law.cuny.edu)

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# Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the *Strickland* Prejudice Requirement

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- \* Forrester Teaching Fellow, Tulane Law School. J.D., Case Western Reserve University School of Law, 1989; B.A., Case Western Reserve University, 1984. The Author would like to thank my Tulane colleagues Elizabeth Cole and Catherine Hancock for comments on a draft of this Article, Professor John Stookey of Arizona State University for reading a draft, and my research assistants: Colin Black, Corey DuFresne, Jennifer Sullivan, and Carrie Wood.

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## I. INTRODUCTION

During Jerry White's trial in Florida for capital murder, each morning the judge required the prosecutor and defense attorney to come to his chambers.<sup>1</sup> During those meetings, the judge had the state attorney check the defense attorney's breath for alcohol.<sup>2</sup> Later, the defense attorney's investigator said he had witnessed the attorney shoot up with cocaine during trial recesses and saw him using speed, Quaaludes, alcohol, morphine, and marijuana after court.<sup>3</sup> On December 4, 1995, Jerry White was executed in Florida.<sup>4</sup>

In a Texas capital case, George McFarland's lawyer reportedly slept through most of the trial because he found it "boring."<sup>5</sup> The presiding judge stated, "The constitution says everyone's entitled to the

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1. Marcia Coyle et al., *Trial and Error in the Nation's Death Belt: Fatal Defense Fatal Flaws*, NAT'L L.J., June 11, 1990, at 30.
  2. *Id.* See also *White v. State*, 664 So. 2d 242, 246 n.4 (1995)(Anstead, J., dissenting)(quoting affidavit submitted by trial prosecutor), *cert. denied*, 116 S. Ct. 591 (1995). In an affidavit, the trial prosecutor stated he believed the defendant did not receive an adequate capital sentencing hearing because of the incompetence of counsel. *Id.*
  3. Coyle, *supra* note 1.
  4. Debbie Salamone, *Jerry White Pays Ultimate Price for '81 Murder*, THE ORLANDO SENTINEL, Dec. 5, 1995, at A1.
  5. Ian Katz, *Reprieve for Man Whose Lawyer Slept*, THE GUARDIAN, April 11, 1995, at 10 (discussing the stay of execution granted in another capital case where the attorney slept during the trial). See also Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1 (discussing Joe Frank Cannon, a Texas capital defense lawyer who boasts of hurrying through trials "like greased lightning," has represented ten people who ended up on death row, and has been accused of sleeping during trials). A recent article noted that "[f]or the third time in a year, the [Texas] Court of Criminal Appeals has refused to overturn a capital murder conviction involving a lawyer who slept during trial." Janet Elliot & Mark Ballard, *No Enhancement of State Jail Felonies; Sleeping in Trial OK*, TEXAS LAWYER, Feb. 16, 1996, at 10.

attorney of their choice. The constitution doesn't say the lawyer has to be awake."<sup>6</sup>

Unfortunately, indigent criminal defendants are not always provided with competent appointed counsel. Sometimes they are not even appointed attorneys who remain alert or sober during trial.

In the courts, the guarantee of a constitutional right to effective assistance of counsel is a relatively recent development. The test for effective assistance was announced by the United States Supreme Court in 1984 in *Strickland v. Washington*.<sup>7</sup> This test has been criticized as allowing slipshod representation of indigent defendants because it creates a presumption that counsel was competent and places the burden of showing prejudice upon the defendant.

For example, in situations where a defense attorney was drunk, abusing drugs, or otherwise mentally impaired during trial, courts applying the *Strickland* test do not find ineffective assistance of counsel unless a defendant can make the difficult showing that counsel's conduct was deficient and such conduct more likely than not altered the outcome of the case. Similarly, in most cases where a defendant claims that defense counsel slept during trial, courts have applied the *Strickland* test, although a few courts have carved out a very narrow exception for certain sleeping situations.

There are certain situations where courts do not place such a high burden on defendants. Courts have not required defendants to make the *Strickland* showing of prejudice where the defendant actually or effectively had no counsel, where defense counsel was not licensed to practice law, where counsel's performance or behavior was extremely egregious, or where counsel had a conflict of interest. As discussed below, the mental impairment and sleeping counsel cases are more comparable to some of these categories than they are with the *Strickland* cases involving the presence of sober and alert counsel throughout trial.

In Part II, this Article presents a brief history of the right to counsel in the United States and the development of a right to effective assistance of counsel. The standard announced by the United States Supreme Court in *Strickland* and some of the criticisms of the *Strickland* test are also discussed. In Part III, this Article discusses exceptions to the *Strickland* ineffective assistance of counsel test and what those exceptions have in common. In Part IV, this Article examines the cases involving ineffective assistance of counsel claims where counsel was sleeping or otherwise mentally impaired. In Part V, this Article examines the existing framework of the *Strickland* test and its exceptions. It specifically addresses the mental impairment cases in

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6. Katz, *supra* note 5, at 10.

7. 466 U.S. 668 (1984).

the context of this framework and proposes a standard for cases involving sleeping counsel and a standard for cases involving counsel who abuse drugs or alcohol during trial.

## II. THE DEVELOPMENT OF THE RIGHT TO COMPETENT COUNSEL AND A COMPETENCY STANDARD

### A. Background

#### 1. *The Right to Counsel*

Before there was a right to "competent" counsel, there had to be a right to counsel. The Sixth Amendment provides that a criminal defendant has a right to "the assistance of counsel for his defence."<sup>8</sup> The question of who is entitled to the right to appointed counsel has been answered only relatively recently.<sup>9</sup>

The first important United States Supreme Court case establishing a right to appointment of counsel for indigent defendants in state cases was *Powell v. Alabama*<sup>10</sup> in which the Court held that the Fourteenth Amendment's due process clause required that an attorney be appointed for indigent capital defendants under certain circumstances. It would be difficult to find a better argument for a right to counsel than the facts in *Powell*. In March 1931, during the Great Depression, a deputy sheriff and a posse of white men arrested a group of nine black teenagers in a small Alabama town, after some white youths complained that the black youths had thrown them off a

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8. U.S. CONST. amend. VI. The Sixth Amendment:

embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

*Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Interestingly, in at least twelve of the thirteen original colonies, the right to counsel was recognized in all criminal prosecutions, although in a few colonies the right was limited to more serious crimes. *Powell v. Alabama*, 287 U.S. 45, 65 (1932). This practice in the colonies, as well as the Sixth Amendment, rejected the English rule that allowed the complete assistance of counsel in misdemeanor trials, but denied defendants the right to use counsel at felony trials, except for arguments on legal questions. See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.1, at 3 (1984).

9. "Only recently have we even recognized that the lack of effective counsel inevitably deprives the poor of the right to a fair trial. For a great many years, the shameful truth was that only the rich could obtain counsel, since only the rich could afford to pay counsel." *United States v. Decoster*, 624 F.2d 196, 265 (D.C. 1979)(Bazelon, J., dissenting), cert. denied, 444 U.S. 944 (1979).

10. 287 U.S. 45 (1932).

train.<sup>11</sup> Allegations of rape by two white women resulted in the nine young men being tried and eight of them being sentenced to death by an all-white jury, although facts would later emerge that showed the allegations were fabricated.<sup>12</sup> The "Scottsboro boys," as they would become known, were from out of state and illiterate.<sup>13</sup> The "proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment"<sup>14</sup> and the defendants narrowly escaped being lynched before trial.<sup>15</sup>

In *Powell*, the United States Supreme Court addressed the cases of three of the young men who were sentenced to death in the state court. Although the *Powell* defendants were represented at trial, the Court found no effective appointment had been made before trial, as the trial judge said "that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared."<sup>16</sup> The Supreme Court found there was a Due Process right to counsel derived from the right to a fair hearing and held that the Scottsboro defendants' right to appointed counsel was violated.<sup>17</sup> However, the Court limited its holding to the facts of the case, noting that it was only deciding that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like," the trial court has a duty to appoint counsel.<sup>18</sup> Significantly, the Court implied some sort of competency requirement in noting that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."<sup>19</sup>

Soon after *Powell*, the Court examined the right to counsel in federal courts in the context of the Sixth Amendment and, in *Johnson v. Zerbst*,<sup>20</sup> extended the right to appointed counsel to all federal crimes

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11. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 116 (1992). See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (revised ed. 1979); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

12. RADELET ET AL., *supra* note 11, at 118.

13. *Powell v. Alabama*, 287 U.S. 45, 52 (1932).

14. *Id.* at 51.

15. GOODMAN, *supra* note 11, at 130-32, 175.

16. *Powell v. Alabama*, 287 U.S. 45, 49 (1932). Some representation was provided by 70-year-old Milo Moody, who was lured by the fee to take the case even though the six other members of the local bar refused to represent the defendants. A Chattanooga attorney reluctantly assisted him. RADELET ET AL., *supra* note 11, at 117.

17. *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

18. *Id.*

19. *Id.*

20. 304 U.S. 458 (1938).

involving incarceration. The Court noted that assistance of counsel is so fundamental that it is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."<sup>21</sup>

Soon after, however, the Court rejected a state defendant's request to expand the scope of the Due Process right to counsel to match the *Johnson* federal standard. In 1942, in *Betts v. Brady*,<sup>22</sup> the Court held that due process only required the appointment of counsel in state court where the totality of the facts in a given case indicates the indigent defendant needs counsel in order to have a fair trial. Commentators criticized the *Betts* special circumstances test because "it was virtually impossible to render a retrospective judgment that a defendant forced to proceed *pro se* had not been prejudiced by lack of counsel."<sup>23</sup>

In 1963, however, the Court overruled *Betts* in *Gideon v. Wainwright*<sup>24</sup> and created a *per se* Fourteenth Amendment right to counsel for all state felony defendants.<sup>25</sup> Later, the Court extended this right to counsel to misdemeanor defendants receiving jail sentences in *Argersinger v. Hamlin*.<sup>26</sup> Ultimately, the Court extended the right to counsel to all "critical stages" in the criminal prosecution.<sup>27</sup>

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21. *Id.* at 467. Also in *Johnson*, the Court held that the Sixth Amendment included the right to appointed counsel as well as the right to retained counsel. *Id.*

22. 316 U.S. 455, 462 (1942). In *Betts*, the Court affirmed the robbery conviction of the petitioner, who had to act as his own attorney when denied his request for counsel. *Betts* also contained an extensive discussion of state laws regarding the right to counsel at the time. *Id.* at 467-72.

23. LAFAVE & ISRAEL, *supra* note 8, at 6. Note that this criticism of the *Betts* standard parallels the criticism of the prejudice standard of the present ineffective assistance of counsel test.

24. 372 U.S. 335, 345 (1963) (overruling *Betts* and holding that the Sixth Amendment guarantee of counsel is a fundamental right). Because *Gideon* made the right to counsel obligatory in state courts through the Fourteenth Amendment, essentially the same constitutional standards apply in both state and federal prosecutions. S.R. Shapiro, Annotation, *Accused's Right to Counsel Under the Federal Constitution—Supreme Court Cases*, 18 L. Ed. 2d 1420, 1423 (1996). See Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (Sixth Amendment right to counsel applies to states via the Fourteenth Amendment). For a more detailed discussion of *Gideon*, see Anthony Lewis's famous book about the decision and the events leading up to it. ANTHONY LEWIS, *GIDEON'S TRUMPET* (Vintage Books 1989) (1964).

25. The court continued to stress the importance of the right to counsel in other cases. In *Douglas v. California*, 372 U.S. 353 (1963), the Court held the Fourteenth Amendment guarantees the right to counsel to a criminal defendant in the first appeal as of right. In *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967), the Court acknowledged that the right to assistance of counsel at trial was so basic to a fair trial that a violation of that right can never be treated as harmless error.

26. 407 U.S. 25 (1972). Cf. *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that Sixth Amendment right to counsel does not extend to indigent defendants where imprisonment is not actually imposed).

27. LAFAVE & ISRAEL, *supra* note 8, § 11.2, at 20.

Since the trial clearly is a critical stage in the criminal prosecution, most of the cases applying the critical stage test have concerned pretrial pro-

## 2. *The Right to Competent Counsel*

As in *Powell*, other Supreme Court cases hinted there was some sort of counsel competency requirement, although the cases did not state what standard should be used to determine whether counsel was competent.<sup>28</sup> In 1945, D.C. Circuit Judge Thurman Arnold narrowly interpreted the standard for ineffective assistance of counsel for federal defendants, holding that the Due Process Clause was violated only "where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."<sup>29</sup> This "farce and mockery" standard, based on the Due Process clause of the Fifth Amendment,<sup>30</sup> was adopted by all eleven circuits by 1970,<sup>31</sup> when the Supreme Court announced in dicta that "the right to counsel is the right to effective assistance of counsel."<sup>32</sup>

After 1970, lower courts began abandoning the "farce and mockery" standard.<sup>33</sup> First, the Fifth Circuit interpreted the right to effective

ceedings. Applying that test, the Supreme Court has held that an 'accused' has the right to the assistance of counsel at a preliminary hearing, at some pretrial identification procedures (but not others), and when subjected to police or prosecutor efforts to elicit inculpatory statements.

*Id.* (footnotes omitted). See, e.g., *Ross v. Moffitt*, 417 U.S. 600 (1974) (right to counsel does not extend to post-conviction discretionary appeals); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (denial of counsel at arraignment in capital case violates right to counsel).

28. See *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

29. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945).

30. *Id.* at 668-69.

31. *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983). See *Bottiglio v. United States*, 431 F.2d 930, 931 (1st Cir. 1970) (per curiam); *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965); *Frاند v. United States*, 301 F.2d 102, 103 (10th Cir. 1962); *In re Ernst*, 294 F.2d 556, 558 (3d Cir.), *cert. denied*, 368 U.S. 917 (1961); *O'Malley v. United States*, 285 F.2d 733, 734 (6th Cir. 1961); *Snead v. Smyth*, 273 F.2d 838, 842 (4th Cir. 1959); *Cofield v. United States*, 263 F.2d 686, 689 (9th Cir.), *rev'd per curiam on other grounds*, 360 U.S. 472 (1959); *Johnston v. United States*, 254 F.2d 239, 240 (8th Cir. 1958); *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850 (1958); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976, 980-81 (7th Cir. 1948).

In *Mitchell*, the court noted several reasons for not having a standard that more closely examined counsel's conduct, including that the whole system of providing representation to indigent defendants would be destroyed if a standard examining counsel's conduct was adopted. "No reputable member of the bar would, nor indeed should, undertake as a public duty the defense of an accused, if the courts were to permit the client thereafter to institute, by allegations as to trial tactics, a public inquiry into the professional competence of the lawyer." *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850 (1958).

32. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). However, the Court did not define the level of competence required by the Constitution. *Id.*

33. *Trapnell v. United States*, 725 F.2d 145, 151 (2d Cir. 1983).



tive counsel to mean "counsel reasonably likely to render and rendering reasonably effective assistance."<sup>34</sup> Then, the Third Circuit abandoned the "farce and mockery" standard in favor of a standard of "normal competency,"<sup>35</sup> and the D.C. Circuit soon held that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."<sup>36</sup> Other circuit courts<sup>37</sup> and some state courts<sup>38</sup> followed this trend, and in 1983, the Second Circuit became the last circuit to abandon the "farce and mockery" standard and adopt the "reasonably competent assistance" standard for trials in criminal cases.<sup>39</sup>

An impetus for this change in competency standards was the Supreme Court's decisions in several cases, including *Gideon*, which shifted the focus in right to counsel cases from the "fair trial" Due Process standard of the Fifth Amendment to the Sixth Amendment right to counsel and the application of that right to the states through the Due Process Clause of the Fourteenth Amendment.<sup>40</sup>

In particular, after the Supreme Court decided in *Gideon* that the Sixth Amendment right to counsel is of sufficiently fundamental importance to be binding on the states under the due process clause of the Fourteenth Amendment, the Court . . . repeatedly referred to some minimal quality of represen-

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34. See *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970)(quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961), *cert. denied*, 368 U.S. 877 (1961)); *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961), *cert. denied*, 368 U.S. 877 (1961) .

35. *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970)(en banc).

36. *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

37. See *Douglas v. Wainwright*, 714 F.2d 1532, 1553 (11th Cir. 1983)("reasonably effective assistance"), *vacated*, 468 U.S. 1206 (1984), *on remand*, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); *Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir. 1980)(en banc)("reasonably competent assistance"), *cert. denied*, 445 U.S. 945 (1980); *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978)(*en banc*)("reasonably competent and effective" assistance), *cert. denied*, 440 U.S. 974 (1979); *United States v. Bosch*, 584 F.2d 1113, 1120-21 (1st Cir. 1978)("reasonably competent assistance"); *Marzullo v. Maryland*, 561 F.2d 540, 543-44 (4th Cir. 1977)("normal competency"), *cert. denied*, 435 U.S. 1011 (1978); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976)("customary skills and diligence" of "a reasonably competent attorney"), *cert. denied*, 434 U.S. 844 (1977); *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975)("minimum standard of professional representation"), *cert. denied*, 423 U.S. 876 (1975); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)("reasonably effective assistance"). See generally *Trapnell v. United States*, 725 F.2d 149, 151-55 (2d Cir. 1983)(discussion of development of "reasonably competency" standard).

38. See e.g., *State v. Williams*, 593 P.2d 896, 901-02 (Ariz. 1979)(en banc); Bruce A. Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1058-59 (1980).

39. *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983).

40. *Id.* at 154-55.

tation in articulating the level of assistance necessary to assure the constitutional validity of criminal convictions.<sup>41</sup>

At least one court stated that the shift to the "reasonably competent assistance" standard was, in part, a result of efforts to improve the quality of representation in federal courts.<sup>42</sup> One court reasoned, "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."<sup>43</sup> Another judge summed up the problem of ineffective assistance of counsel by noting that although disparities of quality of representation are inevitable, "[w]hat offends the Constitution . . . is not merely that there are variations in the quality of representation, but that the burden of less effective advocacy falls almost exclusively on a single subclass of society—the poor."<sup>44</sup>

As state and federal courts adopted the "reasonable competence" standard, some began to add a requirement that prejudice must have resulted from the substandard attorney performance in order to find ineffective assistance of counsel.<sup>45</sup> Some courts required defendants to show varying degrees of prejudice<sup>46</sup> and others required that once the defendant showed attorney incompetence, the state had the burden to prove lack of prejudice.<sup>47</sup> However, the disagreements among

41. *Id.* at 154. See *Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("the Constitution guarantees criminal defendants . . . a competent attorney"); *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (guilty plea may be challenged if trial counsel did not give defendant advice that was "within the range of competence demanded of attorneys in criminal cases").

42. *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983). Still, a study of approximately 4,000 federal and state reported decisions between 1970 and 1983 addressing ineffective assistance claims showed that only 3.9% resulted in a finding of ineffective assistance of counsel. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 632 (1986) (footnote omitted). Although the low number of successful ineffective assistance claims could have been the result of almost every defendant having competent counsel, at least to some extent, the low percentage reflects the fact that the ineffective assistance standards applied by the courts at the time had very little bite.

43. *Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975).

44. *United States v. DeCoster*, 624 F.2d 196, 266 (D.C. Cir. 1979) (Bazelon, J., dissenting).

45. Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1353 (1995).

46. *Id.* at 1353-54. See *United States v. Hinton*, 631 F.2d 769, 771 (D.C. Cir. 1980); *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980); *United States v. Swinehart*, 617 F.2d 336, 341 (3d Cir. 1980); *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981).

47. Clarke, *supra* note 45, at 1353-54. See *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). See also *United States v. Hinton*, 631 F.2d 769, 771 (D.C. Cir. 1980).

the lower courts regarding what standard to apply and whether a showing of prejudice is required would soon be addressed by the Supreme Court.

**B. *Strickland v. Washington*: The Supreme Court Establishes an Ineffective Assistance of Counsel Standard**

In 1984, in *Strickland v. Washington*,<sup>48</sup> the Supreme Court finally addressed the issue of what standard should be applied to attorney competency. In *Strickland*, a defendant sentenced to death claimed that his attorney was ineffective for failing to seek out character witnesses or to request a psychiatric examination and a presentence report.<sup>49</sup>

The Court began its analysis by noting that "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."<sup>50</sup> In determining the standard, the Court stated, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>51</sup> The Court rejected the categorical approach to ineffective assistance claims<sup>52</sup> that some courts had followed by relying upon a specific set of standards for counsel's conduct. Instead, it adopted an approach that did not rely upon specific requirements for counsel.<sup>53</sup> The Court set forth the following two-pronged standard:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were

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48. 466 U.S. 668 (1984). See *United States v. Cronin*, 466 U.S. 648 (1984) (decided the same day as *Strickland*).

49. *Strickland v. Washington*, 466 U.S. 668, 675 (1984).

50. *Id.* at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76 (1942)).

51. *Id.* at 686.

52. See, e.g., *United States v. DeCoster*, 624 F.2d 196, 275 (D.C. Cir. 1979) (Bazelon, J., dissenting) ("The heart of [the categorical] approach lies in defining ineffective assistance in terms of the *quality of counsel's performance*, rather than looking to the effect of counsel's actions on the outcome of the case.").

53. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>54</sup>

The Court noted that more specific guidelines would not work, and that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."<sup>55</sup> Applying this test, the Court found no ineffective assistance of counsel in *Strickland* because the defendant failed to show either unreasonably deficient performance or prejudice.<sup>56</sup>

The Court stressed that the evaluation of counsel's performance must be very deferential and should give a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." <sup>57</sup> As for the prejudice requirement, the Court did note that in certain contexts, prejudice is presumed. Specifically, the Court stated that "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance."<sup>58</sup> The Court allowed a presumption in those situations because prejudice in those cases is so likely that case-by-case analysis is not worth the effort, and because such situations involve Sixth Amendment violations that are easy to identify and for the government to correct.<sup>59</sup> In fact, the Court characterized *Powell* as an ineffective assistance of counsel

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54. *Id.* at 687. The Court noted this test was not significantly different from the "reasonable competence" standard applied by the lower courts, and thus, defendants' claims evaluated under the old standard did not need to be reconsidered. *Id.* at 696-97.

The same standards for reviewing ineffective assistance claims apply whether counsel is retained or appointed. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) ("Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.").

55. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Court did note that representation of a criminal defendant involves some basic duties, including, but not limited to, a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's case, a duty to consult with the defendant on important decisions, a duty to keep the defendant informed of important developments, and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* (citations omitted).

56. *Id.* at 700.

57. *Id.* at 689. The Court reasoned there are several ways to effectively try a case and the Court should not judge the attorney's performance in hindsight. *Id.* Further, the Court reasoned that an intrusive scrutiny of a counsel's decisions would discourage counsel from accepting cases and would interfere with the trust between attorney and client. *Id.* at 690.

58. *Id.* at 692 (citing *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984)).

59. *Id.*

case where prejudice was presumed because of the circumstances surrounding that case.<sup>60</sup>

The Court noted that there is a "limited" presumption of prejudice where defense counsel is operating under a conflict of interest. In those cases, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"<sup>61</sup> In several earlier cases, the Court had found constitutional error without any showing of prejudice when counsel was either totally absent or was prevented from assisting the accused during a critical stage of the proceedings.<sup>62</sup>

Absent a presumption of prejudice, a defendant must prove prejudice, which is more than the fact that the errors had a conceivable effect on the outcome of the proceeding.<sup>63</sup> However, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case.<sup>64</sup> The Court explained that the test for prejudice is that "[t]he defendant must show that there is a reason-

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60. *United States v. Cronin*, 466 U.S. 648, 660-61 (1984). In *Cronin*, the Court declined to presume prejudice where newly appointed counsel, a real estate attorney in his first jury trial, was given little time to prepare. *Id.* at 666-67. As one commentator noted about *Powell*, "In the important search for guidance on the distinction between presence of counsel and performance of counsel, *Powell* is somewhat ambiguous." William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RRS. J. 91, 98 (1995).

61. *Strickland v. Washington*, 466 U.S. 668, 692 (1984)(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)(footnote omitted).

62. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976)(finding a Sixth Amendment violation without a showing of prejudice where the defendant was denied access to counsel during a 17-hour recess during trial); *Herring v. New York*, 422 U.S. 853 (1975)(finding Sixth and Fourteenth Amendment violations where state statute gave judge the power to deny counsel the opportunity to make summation of the evidence); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972)(holding that state statute requiring defendant who desires to testify to do so before any other testimony for the defense is presented infringes upon right to counsel); *White v. Maryland*, 373 U.S. 59, 60 (1963)(per curiam)(holding that lack of counsel at preliminary hearing, at which defendant entered a guilty plea that was used as evidence at trial, required reversal of conviction); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961)(holding that denial of counsel at arraignment required reversal of conviction, even though no prejudice was shown); *Ferguson v. Georgia*, 365 U.S. 570 (1961)(holding that it violates due process to deny a defendant the right to have counsel question him to elicit his statement).

63. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In dissent, Justice Marshall argued that the abridgment of the right to effective assistance of counsel is the same as the abridgment of the right to counsel, which can never be treated as harmless error. Therefore, Marshall concluded that a showing that the performance of defense counsel was below constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice. *Id.* at 711-12 (Marshall, J., dissenting).

64. *Id.* at 693-94.

able probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>65</sup>

An overriding element of *Strickland's* two-prong test is the question of whether the defendant received a fair trial.<sup>66</sup> In a recent case, the Court emphasized *Strickland's* holding that the test for prejudice does not require proof that an attorney's deficient performance was outcome determinative. In *Lockhart v. Fretwell*,<sup>67</sup> the Court held that the failure of a defendant's counsel to make a trial objection to the use of an aggravating factor in a death penalty case, which would have been sustained under the law at the time, was not "prejudicial."<sup>68</sup> The case that would have supported the trial objection was overruled after the trial,<sup>69</sup> so unreliability and unfairness did not result because the alleged ineffectiveness did not deprive the defendant of any substantive or procedural right to which the law entitled him.<sup>70</sup> In *Fretwell*, the Court stated that a prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."<sup>71</sup>

65. *Id.* at 694. This prejudice standard comes from the test for materiality of exculpatory information withheld by the prosecution from the defense and the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. *Id.* See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982); *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). In determining what standard to use, the Court rejected an outcome-determinative standard used for assessing motions for new trial based on newly discovered evidence. The Court reasoned that such a standard would have been more difficult for defense counsel to satisfy and should not apply where, as in the ineffective assistance of counsel context, the trial was possibly unfair. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

66. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronin*, 466 U.S. 648, 658 (1984).

67. 506 U.S. 364 (1993).

68. *Id.* at 372.

69. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985)(prohibiting use of aggravating factors that duplicate elements of underlying charge), *cert. denied*, 474 U.S. 1013 (1985), *overruled by* *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989). See *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

70. *Lockhart v. Fretwell*, 506 U.S. 364, 367 (1993). See *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)(failure to assist in the presentation of perjured testimony could not constitute prejudicial error).

71. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). *But see* *Gilbert v. California*, 388 U.S. 263, 279 (1967)(Black, J., concurring in part and dissenting in part):

I think it far safer for constitutional rights for this Court to adhere to constitutional language like 'the accused shall . . . have the Assistance of Counsel for his defence' instead of substituting the words not mentioned, 'the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial.'

Therefore, under Supreme Court precedent, the focus of an ineffectiveness claim is a deferential standard of whether the trial was reliable and fair. In evaluating the fairness of the trial, courts are to look at whether the counsel's performance was deficient, whether the trial was unfair, and whether there is a reasonable likelihood that the outcome would have been different had counsel's performance not been deficient. Further, in making the deficiency determination, courts defer to an attorney's trial strategy decisions. Regarding prejudice, there are some situations where prejudice will be presumed.

The *Strickland* test has been criticized for many reasons.<sup>72</sup> Justice Blackmun recently noted, "Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'" <sup>73</sup> *Strickland* created an "almost insurmountable hurdle for defendants claiming ineffective assistance."<sup>74</sup> Commentators have noted that although the Court stressed the importance of the Sixth Amendment

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72. The Supreme Court shares a major responsibility for the shameful quality of counsel that is tolerated in the nation's courts. Chief Justice Warren Burger was going around the country talking about how trial lawyers were incompetent at the very same time that the Court he presided over was adopting a standard that amounts to nothing more than 'close enough for government work' in *Strickland v. Washington*.

Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 498 (1995).

73. *McFarland v. Scott*, 114 S. Ct. 2785, 2787 (1994) (Blackmun, J., dissenting). See Mark Ballard & Richard Connelly, *Gideon's Broken Promise*, TEX. LAWYER, Aug. 28, 1995.

74. Martin C. Calhoun, Note, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988). See Hon. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CN. L. REV. 1 (1973) (arguing that defendant should not have to show prejudice); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990) (noting that *Strickland*, along with procedural default cases, has created a substandard level of representation for the poor and the arbitrary infliction of the death penalty); Alan W. Clarke, *supra* note 45, at 1352 ("After *Strickland*, the courts will rarely, if ever, seriously review cases of substandard lawyering—even in capital cases."); William S. Geimer, *supra* note 60, at 138-47 (arguing that *Strickland* prejudice prong effectively has resulted in the deincorporation of the right to effective assistance of counsel); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. SOC. CHANGE 59, 67 (1986) (*Strickland* and *Cronic* appear to be "designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel."); Richard L. Gabriel, Note, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1276-86 (1986) (arguing that *Strickland* prejudice requirement undermines purposes of the Sixth Amendment). See also Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1931, 1935-36 (1994) (arguing that

right to effective assistance of counsel, the strong deference given to a trial counsel's performance indicates the Court's great concern for judicial economy and attorneys' reputations.<sup>75</sup> Further, the prejudice test adopted by the Court in *Strickland* placed substantial emphasis on whether the defendant was factually culpable and insufficient emphasis on whether the defendant received a fair trial and was legally guilty.<sup>76</sup> As one critic observed, "the Sixth Amendment right to effective assistance of counsel exists mainly to aid the factually innocent defendant convince the jury or judge of his legal innocence."<sup>77</sup> For

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the *Strickland* prejudice prong should not apply in death penalty cases because it is so difficult to prove).

An overall critique of the *Strickland* standard is beyond the scope of this Article. For purposes of this Article, the author assumes that the Supreme Court will not overrule *Strickland* in the near future and examines the sleeping and impaired attorney scenario within the *Strickland* framework established by the Supreme Court. However, for purposes of applying the established framework to the sleeping and impaired attorney situation, one needs to be aware of the problems with the *Strickland* standard.

75. Calhoun, *supra* note 74, at 427.

Trial judges (particularly in small rural jurisdictions where all bar members and judges know each other intimately) may well be reluctant to criticize trial counsel's performance. *Strickland* invites the court to take the path of least resistance—to simply find that even if errors occurred, those errors did not prejudice the defendant.

Clarke, *supra* note 45, at 1357. See Bazelon, *supra* note 74, at 25. Judge David Bazelon, former Chief Judge of the United States Court of Appeals for the District of Columbia, noted the reluctance of judges to "soil the reputations" of appointed counsel by finding them ineffective. *Id.*

76. Calhoun, *supra* note 74, at 428-29. Judge Bazelon called this reasoning the "guilty anyway syndrome."

The final reason why judges are reluctant to reverse convictions on grounds of inadequate assistance . . . is the belief . . . that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account. This may be an important reason why appellate courts commonly require appellants to show not only that their constitutional right to effective counsel was denied but also that the denial was prejudicial.

*Id.* at 426.

77. Calhoun, *supra*, note 74, at 428-29. See William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 199 (1984). Another commentator has stated that for a defendant to succeed on an ineffective assistance of counsel claim after *Strickland* and *Fretwell*, "[T]he petitioner must have had truly abysmal lawyering, and since the court seems to equate fairness of the trial with innocence, the defendant must prove innocence in at least some sense (including the odd concept of innocence of the death penalty) before relief will be forthcoming." Clarke, *supra* note 45, at 1362. See *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting):

[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.



some of these reasons, at least one state court has refused to use the *Strickland* test's prejudice requirement under that state's constitution.<sup>78</sup>

### III. CASES WHERE COURTS DO NOT REQUIRE A SHOWING OF PREJUDICE IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL

In several Sixth Amendment right to counsel cases, courts have not required a showing of prejudice by the defendant.<sup>79</sup> These cases make

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78. State courts in Hawaii apply a different two-part test: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." *State v. Aplaca*, 837 P.2d 1298, 1305 (Haw. 1992). The Hawaii test gives greater protection to a defendant's right to effective assistance of counsel than the *Strickland* test does. *Id.* at 1305 n.2. See *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993) ("Accordingly, no showing of 'actual' prejudice is required to prove ineffective assistance of counsel."); *State v. Smith*, 712 P.2d 496, 500 n.7 (Haw. 1986) ("The *Strickland* test has been criticized as being unduly difficult for a defendant to meet. . . . The test for measuring ineffectiveness adopted by this court . . . is not that declared by the Supreme Court. . . ."); *State v. Antone*, 615 P.2d 101, 104-05 (Haw. 1980).

79. A requirement of showing prejudice is distinguishable from harmless error analysis. For the most part, the discussion in this section and in this Article focuses on the prejudice requirement.

Harmless error analysis applies to many constitutional violations. In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict stands. *Id.* at 24.

The *Strickland* prejudice requirement, as discussed above, applies to ineffective assistance of counsel claims and requires that the defendant show that the attorney's conduct prejudiced the defendant. Arguably, when the *Strickland* test is applied, courts should not apply harmless error analysis because the test incorporates the harmlessness standard into the prejudice requirement. See Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 129 n.26 (1993). *Chapman* also noted that certain constitutional errors, including a deprivation of counsel, can never amount to harmless error. *Chapman v. California*, 386 U.S. 18, 24 n.8 (1967). See *Arizona v. Fulminante*, 499 U.S. 279, 294 (1991) (denial of counsel at trial or preliminary hearing "can never be harmless error") (White J., dissenting); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (actions of counsel effectively leaving defendant without appellate representation can never be harmless error).

There are, however, cases in the context of absence of counsel where the defendant did not have to show prejudice, but the court still did a harmless error analysis. See, e.g., *Sanders v. Lane*, 861 F.2d 1033, 1038 (7th Cir. 1988), cert. denied, 489 U.S. 1057 (1989); *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985) (applying harmless error analysis where attorney voluntarily left courtroom during a critical stage of the trial). However, the more logical analysis in most cases where a de facto deprivation of counsel occurred is that a defendant should not be required to show prejudice and the court should not do a harmless error analysis. See *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017-19 (7th Cir. 1988); *Holloway v. Arkansas*, 435 U.S. 475, 489-91 (1978) (not applying harmless error analysis where the attorney had a conflict of interest); *Geders v.*

up several categories: (1) cases where the defendant had no counsel or outside circumstances effectively prevented a defendant from having counsel; (2) cases where counsel was not admitted to the bar; (3) cases where counsel's performance or behavior was extremely egregious; and (4) cases where counsel had a conflict of interest.<sup>80</sup> Cases involving impaired or sleeping counsel are discussed in the next section. The cases that do not require a showing of prejudice form a continuum from actual deprivation of counsel to effective deprivation of counsel.<sup>81</sup> The reasoning in these cases derives from *Strickland*, where the Court noted that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."<sup>82</sup>

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United States, 425 U.S. 80 (1976)(not applying harmless error analysis where defendant was denied access to counsel during a 17-hour recess). *Cf. Rushen v. Spain*, 464 U.S. 114 (1983)(per curiam)(where trial judge had an improper ex parte communication with a juror, the defendant's right to counsel is subject to harmless error analysis unless the deprivation, by its very nature, cannot be harmless).

Finally, some commentators have suggested that instead of having the prejudice requirement of *Strickland*, with the burden on the defendant to show prejudice, the Court should have applied the standard harmless error analysis, with the burden on the State. Geimer, *supra* note 60, at 131-38. See *Strickland v. Washington*, 466 U.S. 688, 711-12 (1984)(Marshall, J., dissenting).

80. Another category of ineffective assistance of counsel cases is where the government interferes with counsel's representation of a defendant, such as the situation where an undercover government agent participates in meetings between defense counsel and the defendant. See *Weatherford v. Bursey*, 429 U.S. 545 (1977)(holding that there was no *per se* Sixth Amendment violation where the agent's purpose was to maintain undercover status and not to spy). The focus in these cases is whether or not the defendant must show that the government gained an advantage from the intrusion. Lower courts are split on this issue. Compare *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991)(holding that the government did not violate the defendant's Sixth Amendment rights because the defendant was unable to show prejudice from the fact that an undercover government informant attended meetings between the defendant and counsel) with *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995)(holding that where government purposefully intrudes into the attorney-client relationship and confidential information is transmitted to the government, prejudice is presumed) with *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984)(applying rule that defendant must show confidential information was transmitted to the government and then the government has the burden to rebut the presumption of prejudice).
81. There are no clear lines between the different types of *per se* prejudice cases as they all involve a deprivation of counsel at some level and the seriousness of the "deprivations" is subject to varying interpretations. Some of the cases discussed may fit into more than one of the categories listed. Thus, although the article breaks the cases into categories, it is important to remember that the cases make up a continuum more than isolated categories.
82. *Strickland v. Washington*, 466 U.S. 688, 692 (1984).

## A. Deprivation of Counsel by the Court

Both before and after the Court's decision in *Strickland*, the Court has "found constitutional error without any showing of prejudice when counsel was either totally absent,<sup>83</sup> or was prevented from assisting the accused during a critical stage of the proceedings."<sup>84</sup> In *Chapman*

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83. *United States v. Cronin*, 466 U.S. 648, 659 (1984). *See, e.g., White v. Maryland*, 373 U.S. 59, 60 (1963)(per curiam)(holding that lack of counsel at a preliminary hearing where the defendant pleaded guilty violated right to counsel without a showing of prejudice); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961)(holding that denial of counsel at arraignment in capital case violates right to counsel without a showing of prejudice). *See also United States v. Taylor*, 933 F.2d 307, 313 (5th Cir. 1991)(holding that a denial of a defendant's request to withdraw his waiver of counsel and to have standby counsel at sentencing phase of trial was prejudicial *per se*, *cert. denied*, 502 U.S. 883 (1991); *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985)(holding that the defendant does not have to make showing under *Strickland* prejudice prong where counsel was absent during jury deliberations and the return of the verdict. Harmless error analysis applies in this situation, but may not apply if absence is at some critical stages); *Golden v. Newsome*, 755 F.2d 1478, 1483 (11th Cir. 1985)(holding that the Sixth Amendment was violated where counsel absent from sentencing because "the total denial of counsel at a critical stage such as sentencing is presumptively prejudicial and is not to be deemed harmless error"); *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985)(holding that defendant improperly deprived of counsel of his choice does not have to show prejudice and that harmless error analysis is inapplicable); *McKnight v. South Carolina*, 465 S.E.2d 352, 354 (S.C. 1995)(finding Sixth Amendment violation where counsel was absent during testimony of the victim and holding "that when counsel is denied at a critical stage of a defendant's trial, prejudice will be presumed and harmless error analysis is precluded"). *See generally United States v. Ellison*, 798 F.2d 1102, 1107 (7th Cir. 1986)(finding ineffective assistance and presuming prejudice where defense counsel testified against the defendant at a hearing on a motion to withdraw plea because the defendant was effectively without the assistance of counsel).
84. *United States v. Cronin*, 466 U.S. 648, 659 (1984). *See, e.g., Penson v. Ohio*, 488 U.S. 75 (1988)(holding that *Strickland* prejudice requirement and harmless error analysis do not apply where defendant was denied appointment of counsel on appeal); *Michigan v. Jackson*, 475 U.S. 625, 626 (1986)(holding that Sixth Amendment is violated where defendants requested counsel during arraignments but were not given an opportunity to consult with counsel before police initiated further interrogations); *Geders v. United States*, 425 U.S. 80, 91 (1976)(finding Sixth Amendment violation without a showing of prejudice where defendant was denied access to counsel during a 17-hour overnight recess during trial); *Herring v. New York*, 422 U.S. 853, 863-65 (1975)(finding Sixth and Fourteenth Amendment violation where state statute gave the judge power to deny counsel the opportunity to make a summation of the evidence); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972)(holding that state statute requiring a defendant who desires to testify to do so before any other testimony for the defense is presented infringes upon right to counsel); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961)(holding that it violates due process to deny a defendant the right to have counsel question him to elicit his statement). *See also United States v. Salomo*, 61 F.3d 214, 221-22 (3d Cir. 1995)(holding that harmless error analysis is inappropriate where trial court failed to make proper inquiry of a defendant regarding waiver of counsel at sentencing hearing); *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir. 1995)(holding that prejudice presumed and defendant was denied right

*v. California*,<sup>85</sup> while fashioning a constitutional harmless error rule, the Court noted that some constitutional rights are so basic that "their infraction can never be treated as harmless error."<sup>86</sup> Among those rights, the Court noted, is the right to counsel.<sup>87</sup> Thus, in cases where a defendant's ineffective assistance of counsel claim is based on the argument that the defendant was denied representation or access to counsel, the Supreme Court and the lower courts generally hold that no showing of prejudice is required. Sometimes, as in *Powell*, surrounding circumstances are such that, although counsel is available to assist the defendant, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."<sup>88</sup>

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to effective assistance of counsel when the state court informed him he could file a pro se petition for a new trial); *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990)(where state court accepted an invalid waiver of counsel, *Strickland*'s prejudice requirement and *Chapman*'s harmless error analysis are inapplicable); *Mudd v. United States*, 798 F.2d 1509, 1512-13 (D.C. Cir. 1986)(holding that order denying a criminal defendant the right to consult with counsel during weekend recess about defendant's testimony violated the Sixth Amendment right to effective assistance without showing of actual prejudice and without harmless error analysis). Cf. *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970)(remanding for determination of whether denial of counsel at preliminary hearing was harmless error).

85. 386 U.S. 18 (1967).

86. *Id.* at 23.

87. *Id.* at 23 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). See *United States v. Cronin*, 466 U.S. 648, 659 (1984)("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial."); *Strickland v. Washington*, 466 U.S. 668, 692 (1984)("denial of the assistance of counsel altogether is legally presumed to result in prejudice"). See also *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

88. *United States v. Cronin*, 466 U.S. 648, 659-60 (1984)(citing *Powell v. Alabama*, 287 U.S. 45 (1932)). See *Herring v. New York*, 422 U.S. 853, 857-58 (1975)(state statute allowing judges in criminal bench trials to deny defense attorneys the chance to deliver closing arguments violates the constitution). Thus, it is possible that a showing of prejudice would be unnecessary if counsel were given inadequate time to prepare for trial. See *Kimball v. State*, 468 N.E.2d 242 (Ind. Ct. App. 1984)(failure to provide adequate opportunity for preparation should be treated as a denial of right to counsel), *reversed*, 474 N.E.2d 982 (Ind. 1985)(reversing Court of Appeals conclusion that counsel was not given adequate time and not addressing whether prejudice needed to be shown); *City of Seattle v. Ratliff*, 667 P.2d 630 (Wash. 1983)(en banc)(holding that petitioner's right to counsel was denied where a law student was prevented from complying with requirements of the limited practice rule in that the student was prevented from contacting his supervisor prior to trial); *State v. Maher*, 290 S.E.2d 694 (N.C. 1982)(holding that with trial court's denial of defendant's motion to continue where attorney had inadequate time to prepare for trial, prejudice is presumed and burden is on the state to show harmless error). See also *Walberg v. Israel*, 766 F.2d 1071, 1075-76 (7th Cir. 1985)(holding that prejudice does not need to be

In *Penson v. Ohio*,<sup>89</sup> appellate<sup>90</sup> counsel was granted leave to withdraw from representing a criminal defendant without filing a proper *Anders*<sup>91</sup> brief. The United States Supreme Court held that because of the denial of counsel, a *Strickland* prejudice requirement was inappropriate.<sup>92</sup> Similarly, in *Geders v. United States*,<sup>93</sup> the Court did not require a showing of prejudice to find a Sixth Amendment violation where a defendant was denied access to counsel during a 17-hour overnight recess during trial. Lower courts have found Sixth Amendment violations without a showing of prejudice or without a harmless error analysis where counsel has been absent during critical stages of the trial.<sup>94</sup>

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shown where trial judge implied that counsel's future appointments would be jeopardized if he pressed too hard during trial), *cert. denied*, 474 U.S. 1013 (1985); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993)(finding rebuttable presumption of ineffective assistance of counsel because state did not supply adequate resources for representing indigent defendants).

89. 488 U.S. 75 (1988).

90. There is a right to effective assistance of counsel on a criminal defendant's first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985). See generally, Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1 (1994)(arguing that *Strickland* prejudice requirement should not apply to claims of appellate ineffectiveness).

91. *Anders v. California*, 386 U.S. 738 (1967)(setting forth procedures for allowing appointed counsel for an indigent defendant to withdraw from a first appeal as of right on the grounds that the appeal was frivolous).

92. *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988). See *Garland v. Cox*, 472 F.2d 875, 879 (4th Cir. 1973)(where defendant shows late appointment of counsel, court presumes ineffective assistance of counsel), *cert. denied*, 414 U.S. 908 (1973).

93. 425 U.S. 80, 91 (1976). Cf. *Perry v. Leeke*, 488 U.S. 272 (1989)(an order prohibiting defendant from consulting with counsel during a 15-minute recess while defendant was testifying did not violate constitution). See generally, Timothy J. McAuley, Note, *An Accused's Right to Counsel During a Trial Recess*, 12 U. BRIDGEPORT L. REV. 97 (1991)(discussing cases involving denial of right to counsel during trial recess).

94. *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir. 1987)(quoting *Siverson v. O'Leary*, 764 F.2d 1208, 1217-18 n.6 (7th Cir. 1985)) *vacated on other grounds*, 484 U.S. 806 (1987), *reinstated*, 839 F.2d 300 (1988), *cert. denied*, 488 U.S. 1034 (1989)("The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial *per se* and justifies an automatic grant of the writ 'without any opportunity for a harmless error inquiry.'"). In *Green*, the court stressed that counsel was absent during a "critical" stage of the proceedings, noting that a harmless error analysis would be appropriate if it were a non-critical stage. *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir. 1987). See *Takacs v. Engle*, 768 F.2d 122, 124 (6th Cir. 1985)(harmless error analysis used to consider the constitutional effect of the denial of counsel at a preliminary hearing).

One court summed up the definition of "critical stage" for purposes of the Sixth Amendment:

A critical stage is one where potential substantial prejudice to defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice. [*Coleman v. Alabama*, 399 U.S. 1, 9 (1970).] Such confrontations include, for example, the indictment, arraignment and preliminary hearing, [*Kirby v. Illinois*, 406 U.S.

The rationale for not requiring a showing of prejudice and for not subjecting these claims to harmless error analysis is similar in all of these cases. At some point, it can be assumed that the defendants in these cases were, either in actuality or in effect, without counsel. In these cases, there were no attorneys to ensure that the "adversarial testing process"<sup>95</sup> was working, and therefore, a fair trial could no longer be presumed. Thus, prejudice should not be required at the point where the adversary process becomes unreliable and the defendant becomes "unable to subject the government's case against him to 'the crucible of meaningful adversarial testing'—the essence of the right to effective assistance of counsel."<sup>96</sup> As one court noted, "there is a great difference between having a bad lawyer and having no lawyer. . . ."<sup>97</sup> Of course, the most extreme example of the deprivation situation is where defendant is actually without counsel.

The other categories of cases where courts have found *per se* prejudice are actually subsets of the deprivation of counsel cases. In effect, they are situations where, while there may not have been an actual denial of access to counsel, the defendants were, in effect, not represented by counsel. Such findings are consistent with *Strickland's* declaration that the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."<sup>98</sup>

## B. Counsel Not Admitted to the Bar

Several courts have found *per se* prejudice in the situation where a criminal defendant's counsel was not licensed to practice law. In *United States v. Novak*,<sup>99</sup> the United States Court of Appeals for the

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682, 689 (1972)], and sentencing. [*Strickland v. Washington*, 466 U.S. 668, 686 (1984).]

*United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014 (7th Cir. 1988).

95. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

96. *Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984)(quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

97. *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991)(citing *Woodard v. Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990))(holding that a denial of a defendant's request to withdraw his waiver of counsel and to have standby counsel at sentencing phase of trial was prejudicial *per se*), *cert. denied*, 502 U.S. 883 (1991).

98. *Strickland v. Washington*, 466 U.S. 668, 692 (1984)(emphasis added).

99. 903 F.2d 883 (2d Cir. 1990). See *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983)(pre-*Strickland* case holding that *per se* prejudice rule applies where retained counsel was not licensed to practice law). See also *In re Johnson*, 822 P.2d 1317 (Cal. 1992)(en banc)(without examining quality of representation, the court held that where defendant's trial attorney had been suspended from the practice of law for conviction of child molestation and had resigned from the State Bar, defendant was denied right to counsel); *State v. Newcome*, 577 N.E.2d 125, 126 (Ohio App. 1989)(finding Sixth Amendment violation and requiring reversal where counsel, who represented defendant at time of guilty plea, was suspended from the practice of law); *People v. Felder*, 391 N.E.2d 1274, 1277 (N.Y. 1979)(holding that harmless error analysis should not apply where defendants

Second Circuit applied a *per se* prejudice standard when a criminal defendant was represented by a person who had obtained admission to the bar through fraudulent means and who was subsequently disbarred. Because counsel had not met the state's substantive requirements for admission to the New York State Bar, the court reasoned there was no foundation for an assumption that the attorney had the legal skills to be admitted properly to the bar.<sup>100</sup>

The courts' reasoning in finding *per se* prejudice in the above situation is similar to the reasoning for finding *per se* prejudice in situations where a defendant was denied representation. In cases where "counsel" has not met the substantive requirements for bar admission, the defendant was, in effect, without counsel. Thus, these cases are actually an extension of the requirement that criminal defendants have an attorney, and where the assistance of counsel has been denied, the error can never be harmless.<sup>101</sup>

### C. Counsel's Behavior or Performance Egregious

Traveling a little further down the continuum from no actual counsel to effective counsel, courts have found that when counsel's conduct is especially egregious, no showing of prejudice needs to be made. On the same day *Strickland* was decided, the Court noted in *United States v. Cronin*, "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself pre-

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were represented by a person who was not a lawyer and did not satisfy the prerequisites for bar admission); *Hucklebury v. State*, 337 So. 2d 400, 403 (Fla. Dist. Ct. App. 1976)(defendant's conviction vacated when represented by a person who passed bar exam, but was refused admission because he did not meet the moral standards for admission). Cf. *People v. Barillas*, 53 Cal. Rptr. 2d 418 (Cal. Ct. App. 1996)(defendant not denied right to counsel when defendant's attorney suspended during trial for commingling client funds with his own money); *People v. Pubrat*, 548 N.W.2d 595, 598 (Mich. 1996)(holding that attorney was not *per se* ineffective when he was suspended during the trial).

100. *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990). The court stressed, however, that mere technical flaws in an attorney's bar license or suspension for technical reasons like failure to pay bar dues did not deprive a defendant of the assistance to counsel. *Id.* at 888. See *People v. Tin Trung Ngo*, 924 P.2d 97, 98 (Calif. 1996)(holding that it was not ineffective assistance of counsel when the attorney had been placed on inactive status by the bar for not keeping up with bar's continuing legal education requirements); *Cantu v. Texas*, 930 S.W.2d 594, 602-03 (Tex. Crim. App. 1996)(not automatic ineffective assistance of counsel when defense attorney was suspended for failure to respond to state bar inquiries before trial). Cf. *People v. Pubrat*, 548 N.W.2d 595, 599 (Mich. 1996)(rejecting distinction between administrative and substantive suspensions and holding that either type of suspension does not always implicate an attorney's fitness to practice law).
101. See *United States v. Novak*, 903 F.2d 883, 886 (2d Cir. 1990); *Chapman v. California*, 386 U.S. 18, 23 (1967).

sumptively unreliable.”<sup>102</sup> The most extreme examples of where courts have found *per se* prejudice because of the especially poor conduct of counsel are cases where counsel was present at trial but refused to participate,<sup>103</sup> and cases where counsel failed to file an appeal.<sup>104</sup> In such cases, defendants are, in effect, without counsel.

102. *United States v. Cronin*, 466 U.S. 648, 659 (1984).

103. *See Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992)(prejudice is presumed where the attorney merely “stood in” during defendant’s sentencing); *Harding v. Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989)(court presumed prejudice when defense counsel in a state criminal proceeding remained silent through most of trial and did not object when the court directed a verdict against the defendant); *Martin v. Rose*, 744 F.2d 1245, 1250-51 (6th Cir. 1984)(counsel refused to participate at trial because he thought participation would waive pretrial motions or make their denial harmless error, court found ineffective assistance of counsel without any showing of prejudice); *Reyes-Vasquez v. United States*, 865 F. Supp. 1539, 1548 (S.D. Fla. 1994)(holding that prejudice was presumed when counsel did not participate in trial because he believed that an appeal of his pretrial motions would be successful); *Gardiner v. United States*, 679 F. Supp. 1143, 1147 (D. Maine 1988)(holding that actual prejudice was presumed when trial counsel failed to aid defendant in any manner with respect to sentencing); *State v. Harvey*, 692 S.W.2d 290, 292 (Mo. 1985)(en banc)(court found ineffective assistance of counsel without a prejudice showing when defense counsel attended but did not participate in a capital murder trial); *State v. Lamoreaux*, 525 P.2d 303, 306 (Ariz. Ct. App. 1974)(court found ineffective assistance and that harmless error analysis does not apply when a privately retained attorney, who was present in court, refused to participate in the proceedings). *Cf. Warner v. Ford*, 752 F.2d 622, 623 (11th Cir. 1985)(holding that attorney’s lack of participation was trial strategy, and, therefore, a prejudice presumption did not apply).

As one court explained using baseball analogies:

Every criminal defendant is entitled to have his lawyer step up to the plate and take his best swing. Movant’s lawyer was essentially a disinterested spectator in this game—he never left his seat, let alone lifted the bat off his shoulder. Such complete inattention to a criminal defendant’s trial cannot pass constitutional muster.

*Reyes-Vasquez v. United States*, 865 F. Supp. 1539, 1548 (1994). In that case, during much of the trial, the attorney was reading. *Id.* at 1548 n.2. At one point, the trial judge asked the attorney to stop reading to hear the verdict. *Id.*

104. *See Castellanos v. United States*, 26 F.3d 717, 720 (7th Cir. 1994)(“A defendant is entitled on direct appeal to legal aid in demonstrating that the district judge committed an error, and he need not make a preliminary showing of ‘prejudice’ tantamount to presenting the appeal without legal assistance.”); *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992)(court found ineffective assistance of counsel and held that appellant did not have to show there were meritorious issues to be appealed where defendant lost his right to direct appeal because of actions of counsel); *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1991)(“We hold that prejudice is presumed under *Strickland* if it is established that counsel’s failure to file a notice of appeal was without the petitioner’s consent.”); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991)(holding that defendant is denied effective assistance of counsel if he asks his lawyer to appeal and the lawyer fails to do so); *United States v. Tajeddini*, 945 F.2d 458, 467 (1st Cir. 1991)(rejecting prejudice analysis for ineffective assistance claim where counsel failed to file a notice of appeal), *cert. denied*, 505 U.S. 1211 (1992); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990)(“[P]etitioner alleges correctly that when courts have found coun-



Additionally, several courts have held that counsel is *per se* ineffective for failing to file an appellate brief.<sup>105</sup> Similarly, some courts have not required a showing of prejudice where appellate counsel filed a brief, but the brief was especially deficient.<sup>106</sup>

In *United States v. Swanson*,<sup>107</sup> trial counsel conceded during his closing argument that "[a]gain in this case, I don't think it really over-all comes to the level of raising reasonable doubt," and that if the ju-

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sel constitutionally inadequate, because either retained or appointed counsel failed to properly perfect an appeal, they do not consider the merits of arguments that the defendant might have made on appeal."); *Estes v. United States*, 883 F.2d 645, 649 (8th Cir. 1989)(vacating sentence and remanding to determine if the attorney was instructed to file an appeal, and if he was, the petitioner need not show prejudice); *Williams v. Lockhart*, 849 F.2d 1134, 1137 n.3 (8th Cir. 1988)(noting that "deficient attorney performance in perfecting an appeal is prejudicial under the *Strickland* . . . standard for determining ineffective assistance of counsel."); *United States v. Nagib*, 844 F. Supp. 480, 484 (E.D. Wis. 1993)(holding that trial attorney's failure to perfect a timely appeal was a *per se* violation of the right to effective assistance of counsel); *Ex parte Dunn*, 514 So. 2d 1300 (Ala. 1987)(holding that failure to file brief for appeal does not require showing of prejudice to establish ineffective assistance where the defendant desires an appeal); *State v. Berlat*, 707 P.2d 303, 307-08 (Ariz. 1985)(holding that failure to perfect a juvenile's appeal of delinquent adjudication was *per se* ineffective assistance of counsel.) See also *Rodriguez v. United States*, 395 U.S. 327, 330 (1969)(a defendant who is denied the right to appeal does not have to show prejudice). But see *People v. Jackson*, 515 N.E.2d 219 (Ill. Ct. App. 1987)(applying *Strickland* prejudice test when counsel filed notice of appeal, but failed to perfect appeal).

105. See, e.g., *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017-18 (7th Cir. 1988)(holding that counsel's ineffectiveness was presumptively prejudicial where counsel failed to file opposition brief during the State's appeal of a suppression order and that harmless error analysis does not apply in such a situation); *Cannon v. Berry*, 727 F.2d 1020, 1022-25 (11th Cir. 1984)(holding that defendant does not have to show actual prejudice to get habeas relief on ground of ineffective assistance of counsel when appellate counsel failed to file a brief on direct appeal from state trial court conviction); *Carroll v. State*, 468 So. 2d 186 (Ala. Crim. App. 1985)(holding that post-conviction petitioner was denied effective assistance on direct appeal when appointed counsel failed to file a brief). Cf. *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986)(failure of counsel to appear at oral argument or to file a reply brief does not warrant the application of a *per se* rule of prejudice).
106. *Jenkins v. Coombe*, 821 F.2d 158, 161 (2d Cir. 1987)(holding that *Strickland* does not apply where appellate counsel files a "paltry" and "inexcusably deficient" brief), *cert. denied*, 484 U.S. 1008 (1988); *Robinson v. Wyrick*, 635 F.2d 757, 758-59 (8th Cir. 1981)(pre-*Strickland* case holding that a showing of prejudice is not necessary when appellate counsel filed a brief but the brief was so deficient it preserved nothing for review); *Evans v. Clarke*, 680 F. Supp. 1351, 1358 (D. Neb. 1988)(holding that showing of prejudice is not required when petitioner's appellate counsel argues that petitioner's position is without merit in brief supporting motion to withdraw). But see *Lockhart v. McCotter*, 782 F.2d 1275, 1283 (5th Cir. 1986)(applying *Strickland* prejudice test to determine that counsel's filing of an affidavit stating that petitioner's appeal was without merit did not constitute ineffective assistance), *cert. denied*, 479 U.S. 1030 (1987).
107. 943 F.2d 1070 (9th Cir. 1991).

rors found his client guilty, they should not agonize over it in retrospect.<sup>108</sup> The Ninth Circuit held that the concession resulted in a deprivation of the right to due process and effective assistance of counsel that was prejudicial *per se*.<sup>109</sup> The court reasoned that the attorney "abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury there was no reasonable doubt."<sup>110</sup> In effect, the defendant was without counsel. Similarly, other courts have found *per se* ineffective assistance of counsel where counsel admitted their clients' guilt.<sup>111</sup>

In *Frazer v. United States*,<sup>112</sup> before trial, the defendant's appointed counsel made a verbal assault on his client, including a racial slur, and threatened to be very ineffective if the defendant insisted on going to trial.<sup>113</sup> The court remanded for an evidentiary hearing on the factual allegations regarding counsel and stated that if they were shown, prejudice supporting the Sixth Amendment violation would be presumed.<sup>114</sup> The court reasoned that the statements were "too extortionate" to qualify as assistance of counsel.<sup>115</sup>

Finally, some courts have held that counsel's failure to investigate can constitute a presumption of prejudice.<sup>116</sup> Courts reason that prejudice is so likely in such circumstances, that it is not worth the time to

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108. *Id.* at 1071.

109. *Id.* at 1074.

110. *Id.* at 1075. Further, the court concluded that the attorney's "abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest." *Id.*

111. See *People v. Hattery*, 488 N.E.2d 513, 517-18 (Ill. 1985)(finding ineffective assistance of counsel when counsel conceded client's guilt in capital case), *cert. denied*, 478 U.S. 1013 (1986); *State v. Harbison*, 337 S.E.2d 504 (N.C. 1985)(finding *per se* ineffective assistance of counsel when counsel admitted the client's guilt to the jury during closing argument without the client's consent), *cert. denied*, 476 U.S. 1123 (1986). See also *People v. Frierson*, 705 P.2d 396 (Cal. 1985)(holding that counsel cannot refuse to follow the defendant's request to present a defense at the guilty/special circumstance phase of the trial), *cert. denied*, 502 U.S. 1061 (1992). The reasoning of these cases relies upon *Brookhart v. Janis*, 384 U.S. 1 (1966), where the Court held that defense counsel could not enter an agreement, without defendant's informed consent, to something that amounts to a plea of guilty or *nolo contendere*.

112. 18 F.3d 778 (9th Cir. 1994).

113. *Id.* at 780.

114. *Id.* at 785.

115. *Id.* at 785.

116. *Sanders v. Sullivan*, 701 F. Supp. 996 (S.D.N.Y. 1987)(counsel's failure to secure key witness's attendance at trial warranted evidentiary hearing on defendant's claims of ineffective assistance); *King v. State*, 810 P.2d 119, 123 (Wyo. 1991)(presuming prejudice and finding ineffective assistance of counsel when defense attorney failed to secure trial testimony of two potential eyewitnesses and failed to interview the witnesses); *Gist v. State*, 737 P.2d 336, 343-44 (Wyo. 1987)(presuming prejudice when counsel did not interview alleged eye witnesses and had no justification for not pursuing interviews).

do a case-by-case inquiry.<sup>117</sup> Thus, courts have found *per se* prejudice in several situations where counsel's conduct was especially deficient.

#### D. Counsel Has a Conflict of Interest

Courts have not required a showing of prejudice or harmless error analysis for ineffective assistance violations where defense counsel had a conflict of interest, such as the situation where counsel represented defendants with conflicting interests.<sup>118</sup> As early as 1942, the Supreme Court refused to do a prejudice analysis when a defendant's lawyer had an actual conflict of interest.<sup>119</sup> In cases where an objection was made at trial to a conflict of interest and the trial judge failed to adequately address the alleged conflict, reversal is automatic without a showing of prejudice under *Holloway v. Arkansas*.<sup>120</sup> Although cases where an objection was not made at trial have not applied a *per se* presumption, they have applied a limited presumption of prejudice when the conflict has an "adverse impact" under the *Cuyler v. Sullivan*<sup>121</sup> standard. The reasoning for not requiring a showing of preju-

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117. *King v. State*, 810 P.2d 119, 123 (Wyo. 1991).

118. *See Glasser v. United States*, 315 U.S. 60, 76 (1942)(prejudice need not be shown for a Sixth Amendment violation when there is multiple representation).

119. *Glasser v. United States*, 315 U.S. 60, 76 (1942)(setting aside conviction of one defendant when counsel had a conflict of interest). *See Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)(court states that harmless error analysis is inappropriate when there has been a "conflict of interest in representation throughout the entire proceeding."); *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)("Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978)("We read the Court's opinion in *Glasser*, however, as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic.").

120. 435 U.S. 475, 488 (1978). Unlike cases where an objection was not made at trial, a showing of "adverse impact" is not required when a defendant made an objection to joint representation at trial and the trial court failed to inquire adequately into the basis of the objection. *See Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992)(finding violation of Sixth and Fourteenth Amendments where defendant timely objected to joint representation and trial court failed to investigate conflict of interest), *cert. denied*, 507 U.S. 1000 (1993). *See also United States v. Cook*, 45 F.3d 388, 393-94 (10th Cir. 1995)(finding ineffective assistance due to conflict of interest where objection was made at trial); *State v. Jenkins*, 898 P.2d 1121, 1130-31 (Kan. 1995)(the defendant's conviction must be reversed when trial court knew that actual conflict of interest existed and failed to inquire further). *Cf. United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992)(noting that prejudice does not need to be shown when counsel had a conflict of interest that adversely affected counsel's performance and district court was aware of the conflict). If a defendant objects at trial to joint representation, a trial court must determine whether an actual conflict exists. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

121. 446 U.S. 335, 349-50 (1980). *See Frazer v. United States*, 18 F.3d 778, 787 (9th Cir. 1994)(Beezer, J., concurring); *United States v. O'Leary*, 806 F.2d 1307, 1312-13 (7th Cir. 1986)(discussing difference between *Cuyler* standard and *Holloway* standard), *cert. denied*, 481 U.S. 1041 (1987).

dice is the same as in the denial of counsel cases: The defendant is effectively without counsel when "the advocate's conflicting obligations have effectively sealed his lips on crucial matters."<sup>122</sup> In *Holloway*, the Supreme Court noted, from a practical standpoint, how difficult it is to determine actual prejudice where counsel has a conflict of interest:

But in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.<sup>123</sup>

Post-*Strickland* cases have followed the Court's reasoning by not requiring a showing of prejudice when defense counsel has an actual conflict of interest.<sup>124</sup>

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122. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). Although *Holloway* and *Cuyler* involved conflicts of interest due to an attorney's representation of clients with conflicting interests, the standards from those cases generally apply to other situations where a criminal defendant's attorney had a conflict of interest. *United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995). See *infra* notes 132-34.
123. *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). In *Holloway*, where one public defender was appointed to represent three defendants charged with robbery and rape, the Supreme Court held that when there were timely objections to a conflict of interest of counsel and the trial judge failed to adequately address the risk of conflict of interest, the defendants were deprived of the Sixth Amendment right to counsel and reversal is automatic. *Id.* The same reasoning regarding the difficulty in estimating the prejudice supports the *Cuyler* situation where a showing of prejudice is not required even if counsel did not make an objection. Further, as discussed in Part V, this same reasoning applies where counsel is sleeping or substance impaired.
124. See, e.g., *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995)(applying *Cuyler* and holding that defense attorney's representation of a records custodian before the grand jury created a conflict that had an "adverse impact" and, therefore, prejudice was presumed); *Lopez v. Scully*, 58 F.3d 38, 41-43 (2d Cir. 1995)(applying *Cuyler* and holding that where defendant alleged that defense counsel coerced him into pleading guilty, there was an actual conflict of interest that adversely affected the lawyer's performance, prejudice was presumed, and harmless error was found to be inappropriate); *United States v. Cook*, 45 F.3d 388, 393-94 (10th Cir. 1995)(applying *Holloway* and finding Sixth Amendment violation without prejudice showing when trial court knew of the conflict of interest); *Burden v. Zant*, 24 F.3d 1298, 1306-07 (11th Cir. 1994)(applying *Cuyler*, finding ineffective assistance, and holding that counsel's informal understanding with prosecutor regarding a second suspect also represented by counsel created an actual conflict of interest that adversely affected counsel's performance); *United States v. Fulton*, 5 F.3d 605, 609-12 (2d Cir. 1993)(finding *per se* ineffective assistance of counsel without even an "adverse impact" showing where attorney is implicated in crimes of the defendant); *United States v. Greig*, 967 F.2d

### 1. *The Cuyler Test*

Before courts presume prejudice in conflict of interest cases when an objection was not made at trial, the defendant must show that an actual conflict of interest<sup>125</sup> exists that affected the attorney. In *Bur-*

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1018 (5th Cir. 1992)(noting that prejudice need not be shown when counsel has a conflict of interest and ordering a new trial when district court failed to hold a hearing after learning that counsel had an actual conflict of interest that later adversely affected his performance); *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992)(applying *Cuyler*, finding ineffective assistance, and holding that when defendant's attorney and co-counsel made legal arguments that helped a co-defendant and harmed the defendant, there was an actual conflict of interest that adversely affected the defendant); *United States v. Ziegenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989)(applying *Cuyler* and holding that counsel's appearance against defendant at state sentencing hearing 20 years earlier constituted an actual conflict of interest that was presumptively prejudicial); *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1251-53 (9th Cir. 1989)(applying *Cuyler*, finding ineffective assistance, and presuming prejudice when counsel had represented co-defendant in first trial), *cert. denied*, 493 U.S. 872 (1989); *Thomas v. Foltz*, 818 F.2d 476, 482 (6th Cir. 1987)(holding that in a multiple representation case, once a defendant shows counsel had an actual conflict of interest and that the conflict had an adverse impact on counsel's performance, prejudice is presumed), *cert. denied*, 484 U.S. 870 (1987); *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986)(applying *Cuyler*, finding ineffective assistance, and presuming prejudice when defense counsel previously represented a prosecution witness); *United States v. Ellison*, 798 F.2d 1102, 1107 (7th Cir. 1986)(applying *Cuyler*, finding ineffective assistance, and presuming prejudice where conflict existed because defense counsel testified against defendant at hearing on motion to withdraw plea), *cert. denied*, 479 U.S. 1038 (1987); *Ford v. Ford*, 749 F.2d 681 (11th Cir. 1985)(applying *Cuyler* and holding, in multiple representation capital case, that prejudice was presumed because there was an actual conflict of interest), *cert. denied*, 474 U.S. 909 (1985); *Virgin Islands v. Zepp*, 748 F.2d 125, 139 (3d Cir. 1984)(presuming prejudice and finding Fifth and Sixth Amendment violations where defense counsel faced potential criminal liability on same charges for which defendant was tried and served as a prosecution witness); *United States v. Bryant*, 35 M.J. 739, 742 (A.C.M.R. 1992)(applying *Cuyler*, holding that counsel had actual conflict of interest and rendered ineffective assistance, and presuming prejudice where counsel allowed considerations of Army in upcoming war with Iraq to interfere with advice to the defendant); *People v. Lawson*, 644 N.E.2d 1172, 1187 (Ill. 1994)(finding ineffective assistance of counsel and *per se* prejudice where defense counsel had appeared at defendant's arraignment on behalf of the state); *Allen v. State*, 874 P.2d 60 (Okla. Crim. App. 1994)(where actual conflict of interest in counsel's representation of both defendant and co-defendant at different times, prejudice is presumed); *Tarwater v. State*, 383 S.E.2d 883 (Ga. 1989)(applying *Cuyler* in a multiple representation case). See also *Whiteside v. Scurr*, 744 F.2d 1323, 1330 (8th Cir. 1984)(applying *Cuyler* limited presumption where counsel had a conflict of interest with client and the attorney threatened to testify against the client), *rev'd*, 475 U.S. 157 (1986).

125. "An actual, as opposed to a potential, conflict of interest exists 'when, during the course of the representation, the attorney's and defendant's interests' diverge with respect to a material factual or legal issue or to a course of action." *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995)(quoting *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993)(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980)), *cert. denied*, 114 S. Ct. 1407 (1994)).

*ger v. Kemp*,<sup>126</sup> the Court followed *Cuyler v. Sullivan*<sup>127</sup> and held where two attorneys in the same firm or one attorney represents co-indictees, prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"<sup>128</sup> Similarly, in *Virgin Islands v. Zepp*,<sup>129</sup> the Third Circuit Court of Appeals held that to show a conflict of interest in violation of the Sixth Amendment, a defendant has "to 'prove (1) multiple representation that (2) created an actual conflict of interest that (3) adversely affected the lawyer's performance.'"<sup>130</sup> If these requirements are met, prejudice is presumed.<sup>131</sup>

Although *Cuyler* applied the "actual conflict" and "adverse effect" standards to a situation involving multiple representation, and the United States Supreme Court has not addressed the question of the scope of *Cuyler*,<sup>132</sup> several lower courts have applied the *Cuyler* standard to various kinds of attorney ethical conflicts.<sup>133</sup> However, at

126. 483 U.S. 776, 783 (1987)(holding that an attorney's partnership with another attorney representing his client's co-indictee in a separate prosecution did not constitute active representation of a competing interest).

127. 446 U.S. 335, 349-50 (1980)("Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.")

128. *Burger v. Kemp*, 483 U.S. 776, 783 (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)(citation omitted). "And it has even been said that such an actual conflict of interest may never be harmless error." *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992)(citing *Glasser v. United States*, 315 U.S. 60, 76 (1942)).

129. 748 F.2d 125, 139 (3d Cir. 1984).

130. *Id.* at 134 (quoting *Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983)).

131. *Id.* at 139.

132. "The Supreme Court has not specifically addressed whether *Cuyler* applies to cases involving conflicts stemming from sources other than multiple representation." *Beets v. Scott*, 65 F.3d 1258, 1295 (5th Cir. 1995)(King, J., dissenting)(citing *Illinois v. Washington*, 469 U.S. 1022, 1023 (1984)(White, J., dissenting from denial of certiorari)), *cert. denied*, 116 S. Ct. 1547 (1996). In *Wood v. Georgia*, 450 U.S. 261 (1981), however, the Court did apply the *Cuyler* test to a conflict of interest arising from the fact that the defendants' attorney was being paid by a third party. One lower court, however, has categorized the *Wood* situation as being the functional equivalent of joint representation. See *Beets v. Scott*, 65 F.3d 1258, 1267 (5th Cir. 1995).

133. See, e.g., *United States v. Hanoum*, 33 F.3d 1128, 1130-32 (9th Cir. 1994)(applying *Cuyler* where allegations were that attorney was having sex with the defendant's wife and thus had an incentive to make sure that the defendant was found guilty), *cert. denied*, 115 S. Ct. 1702 (1995); *Winkler v. Keane*, 7 F.3d 304, 307-10 (2d Cir. 1993)(criminal defense contingency fee arrangement), *cert. denied*, 114 S. Ct. 1407 (1994); *United States v. Sayan*, 968 F.2d 55, 64-65 (D.C. Cir. 1992)(applying *Cuyler* to alleged conflict created by lawyer's fear of antagonizing the judge); *United States v. Michaud*, 925 F.2d 37, 40-42 (1st Cir. 1991)(applying *Cuyler* where defense attorney in tax case taught classes to IRS agents on how to detect tax fraud); *United States v. Horton*, 845 F.2d 1414, 1418-21 (7th Cir. 1988)(applying *Cuyler* where attorney was candidate for U.S. Attorney during his

least one federal court of appeals has limited the application of the *Cuyler* test to the multiple representation situation.<sup>134</sup>

The "adverse effect" requirement in the conflict of interest cases is not the same as the prejudice requirement.

Prejudice requires a probability that the outcome of trial would have been different. In contrast, an adverse consequence requires a likelihood that counsel's performance somehow would have been different. To establish that a conflict of interest adversely affected counsel's performance, the defendant must show that the conflict 'likely' affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant.<sup>135</sup>

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representation of the defendant); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987)(applying *Cuyler* where lawyer was under investigation for bribery); *United States v. Andrews*, 790 F.2d 803, 810-11 (10th Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987)(applying *Cuyler* where court refused to allow attorney to withdraw from representation and start medical school); *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1987)(applying *Cuyler* where the attorney's former law partner was a potential witness and was not called to testify); *Roach v. Martin*, 757 F.2d 1463, 1479-80 (4th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985)(applying *Cuyler* where attorney was being investigated by the state bar while representing the defendant).

134. Recently, the Fifth Circuit, sitting en banc, held that *Strickland*, not *Cuyler*, is the test to apply in situations involving attorney self-interest conflicts. *Beets v. Scott*, 65 F.3d 1258, 1270-72 (5th Cir. 1995)(en banc), *cert. denied*, 116 S. Ct. 1547 (1996). In an 8-5 decision, the court reasoned: "If *Cuyler*'s more rigid rule applies to attorney breaches of loyalty outside the multiple representation context, *Strickland*'s desirable and necessary uniform standard of constitutional ineffectiveness will be challenged." *Id.* at 1272. See Alexandra N. DeNeve, Note, *Recent Development: The Fifth Circuit Adopts the Strickland Test to Deal with Ineffective Assistance Claims that Arise from Conflicts of Interest that Do Not Involve Multiple- or Serial-Client Representation*, 70 TUL. L. REV. 1689 (1996). See also *Johnston v. Mizell*, 912 F.2d 172, 177 (7th Cir. 1990)(noting that *Cuyler* does not apply to every ineffective assistance claim involving a conflict of interest), *cert. denied*, 498 U.S. 1094 (1991).

Additionally, the Ninth Circuit has noted it is not "logically necessary" that *Cuyler* also applies "to conflicts between a defendant's and the attorney's own personal interests." *Garcia v. Bunnell*, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1374 (1995). Still, as discussed in the previous footnote, the majority of courts do not limit *Cuyler* to only multiple representation cases. See *Beets v. Scott*, 65 F.3d 1258, 1295-96 (5th Cir. 1995)(King, J., dissenting).

135. *Frazer v. United States*, 18 F.3d 778, 787 (9th Cir. 1994)(Beezer, J., concurring)(citations omitted). "Adverse effect is not the equivalent of prejudice, the reasonable probability of a different result, as the term 'prejudice' is defined in *Strickland*. Injury sufficient to justify reversal is presumed from the showing of adverse effect." *United States v. Greig*, 967 F.2d 1018, 1024 (5th Cir. 1992)(quoting *States v. Abner*, 825 F.2d 835, 843 (5th Cir. 1987)(citing *Nealy v. Cabana*, 782 F.2d 1362, 1365 (5th Cir. 1986))). The "adverse impact" test only requires the defendant to show there was a plausible alternative strategy that was inherently in conflict with the attorney's other interests. *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). However, the defendant does not have to show the alternative strategy was reasonable, the counsel's conduct affected the outcome of the trial, or that, but for the conflict, counsel's conduct would have been different. *Id.*

In some extreme situations, courts do not require a showing of "adverse impact."<sup>136</sup>

Thus, the conflict of interest cases create another area where courts do not require a showing of prejudice for an ineffective assistance of counsel claim.

#### IV. MENTALLY IMPAIRED AND SLEEPING ATTORNEY CASES

##### A. Ineffective Assistance of Counsel Claims Where Counsel was Intoxicated, Abusing Drugs, or Mentally Ill

In cases where a criminal defendant's attorney has been impaired due to alcohol or drugs, the lower courts have uniformly applied the *Strickland* test to evaluate a claim of ineffective assistance of counsel and required the defendant to show prejudice. In *Berry v. King*,<sup>137</sup> the Fifth Circuit held that the fact that an attorney used drugs is not, "*in and of itself*, relevant to an ineffective assistance claim."<sup>138</sup> While noting that the question of whether the attorney used drugs during the trial was not settled, the court stressed that the proper inquiry is the *Strickland* test.<sup>139</sup> The Fifth Circuit followed this reasoning in a situation where the defendant claimed that his attorney was ineffective due to alcohol abuse because the defendant could smell alcohol on his attorney's breath during trial, and after the trial, the attorney entered a facility for treatment of alcohol abuse.<sup>140</sup>

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136. In *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), the Second Circuit noted that "adverse impact" does not have to be shown "when an attorney is implicated in the crimes of his or her client since, in that event, the attorney cannot be free from fear that a 'vigorous defense should lead the prosecutor or the trial judge to discover' evidence of the attorney's 'own wrongdoing.'" *Id.* at 611 (citations omitted). In *Fulton*, the court held the defendant did not have to show adverse impact where the lead trial counsel was engaged with him in heroin trafficking. *Id.* at 612. See *Allen v. State*, 874 P.2d 260, 264 (Okla. Crim. App. 1994)(defendant did not have to show adverse effect where attorney did not tell the client that he previously represented someone else in the same manner); *Tarwater v. State*, 383 S.E.2d 883, 885 (Ga. 1989)(holding that *per se* "adverse impact" found when an attorney representing multiple defendants negotiates a plea bargain conditioned upon more than one client pleading guilty); *State v. Cyrs*, 529 A.2d 947, 950 (N.H. 1987)(finding *per se* "adverse impact" where the State knew of the conflict of interest when the defense attorney had been a target in the investigation that led to the client's arrest).

137. 765 F.2d 451, 454 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

138. *Id.* (emphasis added).

139. *Id.* Thus, the court basically ignored the drug abuse allegations and concentrated on the specific allegations of deficient performance and prejudice. *Id.*

140. *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993). The court rejected the argument that counsel was *per se* ineffective because of the alcohol abuse and, as in *Berry*, noted that the defendant had failed to show that counsel was impaired during trial due to alcohol abuse. *Id.*



In *Fowler v. Parratt*,<sup>141</sup> the defendant's trial attorney was later found incompetent to practice law because the attorney admitted he was an alcoholic and suffered blackouts during the time he represented the defendant. However, the Eighth Circuit rejected the defendant's argument that once it is established that the attorney is an alcoholic there should be a rebuttable presumption that the attorney was ineffective.<sup>142</sup> Instead, the court found the defendant failed to show that he was prejudiced by any of the errors he claimed that his attorney committed.<sup>143</sup>

Similarly, the California Supreme Court rejected a defendant's claim that his attorney was *per se* ineffective due to his alcoholism.<sup>144</sup> The attorney was an alcoholic who died of the disease following the trial.<sup>145</sup> It was undisputed that the attorney was an alcoholic at the time of the representation and that he consumed large amounts of alcohol each day of the trial.<sup>146</sup> Evidence was submitted that the attorney drank in the morning, during court recesses, and throughout the evenings.<sup>147</sup> During the second day of jury selection, the attorney was arrested for driving to the courthouse with a .27 blood-alcohol content.<sup>148</sup> The day after the arrest, the judge made an inquiry into the matter and gave the defendant the opportunity to have new counsel appointed, but the defendant declined.<sup>149</sup> The judge stated that the attorney's courtroom behavior gave no reason for his removal and personally assured the defendant before trial "that you probably have one of the finest defense counsel in this county" and after trial that counsel "has been one of the better defense attorneys in this county."<sup>150</sup> In rejecting a *per se* rule, the court reasoned that such a rule would create a presumption against the competence of alcoholic attorneys and would invite defendants to challenge their convictions on the basis of speculation about the drinking habits of their attorneys.<sup>151</sup>

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141. 682 F.2d 746, 750 (8th Cir. 1982).

142. *Id.* at 750.

143. *Id.* Although *Fowler* was a pre-*Strickland* case, the court applied the same two-part test as *Strickland* did: "First, there must have been a failure on the part of defense counsel to perform some essential duty owed to the client; second, that failure must have resulted in prejudice to the defense." *Id.* at 748 (citing *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974)).

144. *People v. Garrison*, 765 P.2d 419 (Cal. 1989).

145. *Id.* at 440.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 440-41.

151. *Id.* at 441. The court rejected the defendant's claim that his attorney's performance was deficient. *Id.*

Other state and federal courts have held that abuse of alcohol,<sup>152</sup> cocaine,<sup>153</sup> or prescription medication<sup>154</sup> does not create *per se* ineffec-

152. See *United States v. Scaretta*, No. 96-1151(L), 1997 U.S. App. LEXIS 2696, at 16-18 (2d Cir. Feb. 12, 1997) (holding that an attorney's alcoholism, by itself, does not constitute ineffective assistance of counsel *per se*; *United States v. Germain*, No. 95-6723, 76 F.3d 376 (table), 1996 WL 43578, at \*5 (4th Cir. Feb. 5, 1996) (holding that even if allegations about attorney being intoxicated during a Rule 11 hearing were true, there was no evidence that the attorney's performance fell below objective standards of reasonableness or that defendant was prejudiced); *Hernandez v. Wainwright*, 634 F. Supp. 241 (S.D. Fla. 1986), *aff'd without op.*, 813 F.2d 409 (11th Cir. 1987) (applying *Strickland* and finding no ineffective assistance); *State v. Machado*, No. 94-1170, 95-1199, 551 N.W. 2d 62 (table), 1996 WL 252562, at \*2-3 (Wis. Ct. App. May 15, 1996) (holding that in light of trial court's finding that counsel's drug and alcohol problems did not manifest themselves during the trial, the defendant did not sustain burden to prove counsel performed deficiently). See also *O'Brien v. Commonwealth*, 74 S.W. 666 (Ky. 1903) (refusing relief to a condemned prisoner where his lawyer was allegedly drunk during the trial). Cf. *State v. Keller*, 223 N.W. 698, 699 (N.D. 1929) (finding that where counsel was so drunk the defendant in effect had no counsel, the defendant was "clearly prejudiced").
153. See *State v. Coates*, 786 P.2d 1182 (Mont. 1990) (court applied *Strickland* and found that the attorney's use of cocaine was irrelevant to claim of ineffective assistance of counsel). In *Gardner v. Dixon*, No. 92-4013, 1992 U.S. App. LEXIS 28147 (4th Cir. 1992) (per curiam), the Fourth Circuit Court of Appeals held that newly discovered evidence of counsel's cocaine and alcohol abuse during trial did not affect its previous finding under *Strickland* that counsel's performance was not deficient and that the defendant was not prejudiced. *Id.* at \*29-30. The newly discovered evidence consisted of "numerous affidavits" detailing counsel's use of drugs and alcohol and the disabling impact of the use of cocaine. *Id.* at \*17-24. However, affidavits submitted by the State, including one by the trial judge, indicated that counsel did not display signs of substance abuse. *Id.* at \*24-26. Two days after the decision by the Fourth Circuit Court of Appeals, John Gardner was executed in North Carolina. *Man Is Put to Death for Double Slaying During Crime Spree*, N.Y. TIMES, Oct. 24, 1992, at A7. One commentator noted, "[F]ew people would want their lives to depend upon the investigation and preparation of a drug-dependent lawyer. This case is troubling; it demonstrates just how demanding and unfair the prejudice prong of *Strickland* is." Clarke, *supra* note 45, at 1369-70.
154. In *McDougall v. Dixon*, 921 F.2d 518, 534-35 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991), the Fourth Circuit Court of Appeals found the defendant did not show prejudice from the fact that counsel was being treated for depression and severe migraines and taking medication. The court reasoned: "Many lawyers and judges are on various forms of medication while attending to their duties in the courtroom, but this is not the test. The appellant must show that the medication affected his attorney in such a way that the attorney could not and did not render adequate legal assistance during the trial." *Id.* at 535. See also *Bonin v. Vasquez*, 794 F. Supp. 957 (C.D. Cal. 1992) (applying *Strickland* and holding that the defense attorney's use and alleged abuse of prescription medication did not affect his performance at trial); *Fellman v. Poole*, No. C 90-20007 JW, 1993 WL 248693, at \*5 (N.D. Cal. June 28, 1993) (rejecting ineffective assistance of counsel claim where defense counsel took medications for high blood pressure, physiological depression, migraines, and ulcers, but two doctors testified at a motion for retrial that counsel functioned well on those medications).

tiveness.<sup>155</sup> Similarly, the few courts that have addressed the issue have uniformly applied the *Strickland* test where criminal defendants claimed their attorneys were ineffective due to psychological ailments. In *Bellamy v. Cogdell*,<sup>156</sup> the defendant in a murder trial was represented by a 71-year old attorney who, according to the attorney's physician, suffered from a variety of physiological ailments around the time of the trial, was "virtually incapacitated," and was unable to concentrate at times.<sup>157</sup> In the months before, and during the trial, the attorney, Sidney Guran, was subject to disciplinary proceedings. In those proceedings, Guran's attorney had requested the hearing be adjourned because Guran was "not mentally capable of preparing for the hearing."<sup>158</sup> In a letter to the disciplinary committee, Guran said that he was essentially retired and had taken no new work except for the case of Bellamy, who he had previously represented. Guran told the committee that he would have a competent attorney assist him in representing Bellamy, although because of other commitments of the other attorney, Guran ended up representing Bellamy alone.<sup>159</sup> More than two months after Bellamy's conviction, Guran was suspended from the practice of law.<sup>160</sup> On a petition for writ of habeas corpus, a panel of the Second Circuit Court of Appeals applied a *per se* rule and found counsel ineffective. The court, however, reheard the case in banc and voted 7-6 to reject the *per se* rule and apply the *Strickland* test.<sup>161</sup>

The court noted that it applied a *per se* rule in two limited circumstances: where counsel was not licensed to practice law because of a

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155. See also *Young v. Zant*, 727 F.2d 1489, 1492-93 (11th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). In *Young*, which was decided prior to *Strickland*, the court found no ineffective assistance where John Young's defense counsel allegedly used drugs during trial, testified at state habeas corpus proceedings that he had a drug problem, and was convicted for possession of marijuana shortly after Young's trial. *Id.* John Young was executed in 1985. See *McFarland v. Scott*, 114 S. Ct. 2785, 2787 (1994) (Blackmun, J., dissenting).
156. 974 F.2d 302 (2d Cir. 1992) (en banc), *vacating*, 952 F.2d 626 (2d Cir. 1991), *cert. denied*, 507 U.S. 960 (1993).
157. *Id.* at 304-05.
158. *Id.* at 303.
159. *Id.* at 304.
160. *Id.* Compare *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (finding *per se* prejudice where the defendant was represented by a person who had obtained admission to the bar through fraudulent means and was later disbarred) and *People v. Hinkley*, 193 Cal. App. 3d 383, 387, (1987) (finding a Sixth Amendment violation and vacating conviction where an attorney was placed on "inactive" list prior to defendant's trial because the attorney had become incompetent to represent clients) with *Commonwealth v. Vance*, 546 A.2d 632, 637 (Pa. 1988) (finding no Sixth Amendment violation where attorney was disbarred because disbarment is not the same as never having been admitted to the bar).
161. The dissent in *Bellamy* argued that a *per se* rule should apply. *Bellamy v. Cogdell*, 974 F.2d 302, 309-13 (2d Cir. 1992) (en banc), *vacating*, 952 F.2d 626 (2d Cir. 1991), *cert. denied*, 507 U.S. 560 (1993).

failure to meet the substantive requirements for the practice of law<sup>162</sup> and where counsel was implicated in the defendant's crimes.<sup>163</sup> The court noted two rationales for applying the *per se* rule: (1) where counsel is not duly licensed, the failure to provide counsel to a criminal defendant creates a jurisdictional bar to conviction; and (2) where counsel is implicated in the defendant's crimes, there is a conflict of interest.<sup>164</sup> The court stated that application of a *per se* rule must be justified under one or both of the rationales, but the court did not explain why it was limited to those rationales. The court further stated that neither rationale applied to the case because Guran was admitted to the bar, there was no fraudulent behavior, and there was no conflict of interest.<sup>165</sup> Further, the court reasoned that a *per se* rule should not apply because there is nothing inherent in an attorney's illness that will impair his or her representation most of the time. Therefore, the court concluded, such claims are better suited to the fact-specific prejudice inquiry of *Strickland*.<sup>166</sup> The court also noted that a hearing resulted in the finding that Guran had no mental incapacity at the time of trial.<sup>167</sup>

In *Smith v. Ylst*,<sup>168</sup> the Ninth Circuit Court of Appeals also rejected a claim that a *per se* ineffectiveness rule should apply where the defense attorney is mentally ill. The defendant argued that mental illness, like sleeping, required a *per se* ineffectiveness rule.<sup>169</sup> The defendant submitted declarations describing the trial attorney's conduct during the time of trial and of trial preparation.<sup>170</sup> The declarations indicated that the attorney believed his life was in danger and he discussed a conspiracy theory during his opening argument.<sup>171</sup> The attorney's secretary said that the attorney told her he was crazy and wanted to go to an insane asylum.<sup>172</sup> Two psychiatric reports indicated that the attorney exhibited a paranoid psychotic reaction, but the prosecuting attorney offered a declaration that the attorney acted no differently than any other criminal defense attorney.<sup>173</sup> The court affirmed the district court's rejection of a *per se* rule and held that the trial court was not required to *sua sponte* hold a hearing on the issue

162. See *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990)(counsel fraudulently obtained a license); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983)(counsel was not a member of any bar).

163. See *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984).

164. *Bellamy v. Cogdell*, 974 F.2d 302, 306-07 (2d Cir. 1992).

165. *Id.* at 307-08.

166. *Id.* at 308.

167. *Id.*

168. 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988).

169. *Id.* at 875.

170. *Id.* at 874.

171. *Id.*

172. *Id.*

173. *Id.*

of defense counsel's competency.<sup>174</sup> The court noted that the trial court reasonably found that the evidence did not raise a genuine doubt about the attorney's competence.<sup>175</sup> This finding is similar to the findings in several other cases discussed in this Article that dealt with allegations about the attorney's substance abuse or competency.

Thus, courts apply the *Strickland* test where defense attorneys are mentally impaired due to drugs, alcohol, or psychological ailments. In none of these cases did a court find that the allegedly impaired attorney was constitutionally ineffective.

## B. Ineffective Assistance of Counsel Claims Where Counsel Slept During Trial

The one area of attorney mental "impairment" where courts have applied a *per se* ineffective assistance rule is where a criminal defense attorney sleeps through a substantial portion of the trial. In *Javor v. United States*,<sup>176</sup> a pre-*Strickland* case, the Ninth Circuit Court of Appeals held that "when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary."<sup>177</sup> In *Javor*, a federal magistrate found no prejudice but found that defense counsel slept or was not alert during a substantial portion of a trial for sale and possession of heroin.<sup>178</sup> The court applied a *per se* rule because "unconscious or sleeping counsel is equivalent to no counsel at all."<sup>179</sup> The court reasoned that requiring a showing of prejudice would require "unguided speculation" and could not be applied even-handedly "because an attorney's absence prejudices a defendant more by what was not done than by what was done."<sup>180</sup>

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174. *Id.* at 877.

175. *Id.*

176. 724 F.2d 831 (9th Cir. 1984).

177. *Id.* at 833 (citing *Holloway v. Arkansas*, 435 U.S. 475, 489-91 (1978) and *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983)(*per curiam*)).

178. *Id.* at 832-33. Perhaps part of the reason the appellate court was willing to apply a *per se* rule to this case was the somewhat inconsistent findings of the magistrate. Initially, the magistrate found that the defense attorney slept during a substantial portion of the trial, including during times when important evidence was being elicited and "the participation of trial counsel . . . was proper." *Id.* at 832. However, the magistrate concluded the defendant was not prejudiced and recommended that relief be denied. After the appellate court ordered an evidentiary hearing regarding whether there was actual prejudice, the magistrate found that the attorney made proper objections and "presented as adequate a defense as the facts appear to have permitted." *Id.* at 833.

179. *Id.* at 834.

180. *Id.* at 835 (quoting *Cooper v. Fitzharris*, 586 F.2d at 1325, 1332 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1978)(quoting *Holloway v. Arkansas*, 435 U.S. 475, 490, 491)). "The magistrate's second report on the issue of prejudice found no error based on Javor's attorney's conscious participation in the trial. The real

In *United States v. Petersen*,<sup>181</sup> a post-*Strickland* case out of the Ninth Circuit, the court applied *Javor*, but found that the attorney had not been sleeping or dozing during a substantial portion of trial. Thus, the court concluded that the defendant had the burden of showing prejudice under *Strickland* and the defendant did not meet that burden.<sup>182</sup> A California district court followed the *Peterson* reasoning and found no presumption of prejudice where counsel twice "may have nodded off during the trial"<sup>183</sup> because "he did not sleep through a substantial portion of the two-month trial."<sup>184</sup>

In *Tippins v. Walker*,<sup>185</sup> another post-*Strickland* case, the Second Circuit Court of Appeals followed the reasoning of *Javor* by applying a *per se* rule in certain situations where counsel slept during trial. However, the Second Circuit rejected the *Javor* test that required a finding of *per se* prejudice when counsel sleeps during a "substantial" portion of the trial.<sup>186</sup> The court noted that the word "substantial" was unhelpful because the *Javor* court did not explain what was meant by "substantial," which could refer to the length of time counsel slept, the significance of the proceedings, or the proportion of the proceedings missed.<sup>187</sup> The court stated that ordinarily the *Strickland* analysis would be sufficient for episodes of inattention or sleep, noting that:

Prolonged inattention during stretches of a long trial (by sleep, preoccupation or otherwise), particularly during periods concerned with other defendants, uncontested issues, or matters peripheral to a particular defendant, may be quantitatively substantial but without consequence. At such times, even alert and resourceful counsel cannot affect the proceedings to a client's advantage.<sup>188</sup>

The court noted, however, that the *Strickland* standard allows a court to consider an improper decision by counsel as a strategy decision, but the underlying assumption in such a situation is that counsel

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question was the effect of his failure to participate in the substantial portion of the trial during which he slept." *Id.* at 835.

181. 777 F.2d 482, 484 (9th Cir. 1985), *cert. denied*, 479 U.S. 843 (1986).

182. *Id.* The United States Court of Appeals for the District of Columbia Circuit also referred to *Javor* in the context of the claim of ineffective assistance of counsel where counsel sleeps through trial. *United States v. Debango*, 780 F.2d 81, 86 (D.C. Cir. 1986). However, in *Debango*, the court did not address the claim because the defendant failed to submit any evidence on the issue to the district court to support his motion for a new trial. *Id.* See also *United States v. Onaghise*, No. 94-16679, 85 F.3d 638 (table), 1996 WL 204544, at \*2 (9th Cir. April 22, 1996)(rejecting ineffective assistance claim because of insufficient evidence of sleeping).

183. *Fellman v. Poole*, No. C 90-20007 JW, 1993 WL 248693, at \*5 (N.D. Cal. June 28, 1993)(denying habeas petitioner's ineffective assistance of counsel claim).

184. *Id.*

185. 77 F.3d 682 (2d Cir. 1996).

186. *Id.* at 685.

187. *Id.*

188. *Id.* at 686.

is alert and able to exercise judgment.<sup>189</sup> Specifically, the court stated:

[A]s the majority reasoned in *Javor*, "prejudice is inherent" at some point, "because unconscious or sleeping counsel is equivalent to no counsel at all." Effectiveness of counsel depends in part on the ability to confer with the client during trial on a continuous basis, and the attorney must be "present and attentive" in order to make adequate cross-examination—"a matter of constitutional importance" by virtue of the Sixth Amendment. Moreover, if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable. The errors and lost opportunities may not be visible in the record, and the reviewing court applying the traditional *Strickland* analysis may be forced to engage in "unguided speculation."<sup>190</sup>

Thus, the *Tippins* court applied the following test: the defendant "suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake."<sup>191</sup> The court then noted that the district court found that the defendant's attorney slept every day of the trial and during critical testimony. The court further noted that the record showed that the attorney was actually unconscious and his "sleeping was not a fitful inattention or a meditative focusing of the mind's powers."<sup>192</sup>

Finally, the court concluded that the defendant's interests were at stake during the time of unconsciousness.<sup>193</sup> Witnesses later testified that counsel was sleeping during specific key witnesses.<sup>194</sup> Further, reprimands by the trial court did not cure the sleeping problem, although the reprimands illustrated the "dangerous character of the problem."<sup>195</sup> Thus, the court found the defendant was deprived of effective assistance of counsel in violation of his Sixth Amendment right to counsel.<sup>196</sup>

In general, unlike the mental impairment cases, courts have found ineffective assistance of counsel and a presumption of prejudice in the sleeping counsel cases. Still, the two circuit courts that have ad-

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189. *Id.* at 686-87.

190. *Id.* at 686 (citations omitted).

191. *Id.* at 687.

192. *Id.* at 689. The court discussed the state's analogies to other kinds of lawyer impairment that have not been found to warrant findings of *per se* prejudice, including the cases discussed above about drug abuse, alcohol abuse, and mental impairment. *Id.* at 688-89. While noting that consciousness and sleep form a continuum and there are varying states of drowsiness, the court stressed that in this case it was clear that counsel was unconscious. *Id.* at 689. Witnesses heard the counsel snoring and saw his head down as if sleeping. *Id.*

193. *Id.* at 689.

194. *Id.* at 689-90.

195. *Id.* at 690.

196. *Id.*

dressed this issue are split on the question of what must be shown to constitute *per se* prejudice.<sup>197</sup>

## V. PROPOSED STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS INVOLVING SLEEPING OR MENTALLY IMPAIRED COUNSEL

### A. The Existing Framework

Parts III and IV of this Article addressed several ineffective assistance of counsel cases where courts have not applied the *Strickland* requirement that the defendant show prejudice. In those cases, to varying degrees, defendants were effectively without counsel. There is a continuum of ineffective assistance of counsel cases, with one extreme being no counsel and the other extreme being competent counsel.<sup>198</sup> If, under the courts' reasoning, one were to rank the various right to counsel situations from the most egregious constitutional violations to the least egregious situations, the list would look like this:

- (1) no counsel at all;
- (2) no counsel at a "critical stage" of the trial;
- (3) surrounding circumstances prevent defense attorney from being able to act as counsel;
- (4) "counsel" does not meet substantive requirements for Bar admission;
- (5) counsel has a conflict of interest and an objection is made at trial;
- (6) counsel sleeps during a portion of the trial (*Javor/Tippins* standards);
- (7) counsel is egregiously ineffective, such as where counsel refuses to participate in the trial, does not file an appeal, or concedes guilt;
- (8) counsel has a conflict of interest and no objection is made at trial;
- (9) counsel is drunk, using drugs, or otherwise substantially mentally impaired;
- (10) counsel made errors at trial that may or may not have prejudiced the client; and
- (11) counsel made no errors.

In categories 1-7, courts generally do not require a showing of prejudice for a Sixth Amendment violation. Courts, however, are not con-

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197. The U.S. Supreme Court has never addressed the issue of whether prejudice is required in sleeping counsel cases. See *Ex parte* Burdine, 901 S.W.2d 456, 457-58 (Tex. Crim. App. 1995)(Maloney, J., dissenting). Additionally, the issue currently is being litigated in the Fifth Circuit in *Burdine v. Scott*, No. H-94-4190 (E.D. Tex.). See Mark Ballard, *Sleeping-Lawyer Claim Brings Stay of Execution*, TEX. LAW., April 17, 1995, at 6.

198. See *United States v. DeCoster*, 624 F.2d 196, 201 (D.C. Cir. 1976). In this pre-*Strickland* case, the court noted:

The cases present a continuum. At one end are cases of structural or procedural impediments by the state that prevent the accused from receiving the benefits of the constitutional guarantee. The most obvious example is, of course, the failure of the state to provide any counsel whatever. . . . At the other end of the continuum are cases . . . in which the issue is counsel's performance when he is 'untrammelled and unimpaired' by state action.

*Id.* at 201-02 (footnote omitted).



clusive on category 6 regarding sleeping counsel. Why no prejudice should be required for this category, as well as how this category should be defined, is discussed below. In category 8, regarding conflict of interest cases where no objection was made at trial, courts place a higher burden on defendants but they do not require a showing of prejudice if other showings are made. In categories 9-11, courts apply the *Strickland* test and require a showing of prejudice before making a finding of ineffective assistance of counsel.<sup>199</sup> However, I argue below that the substance impaired or mentally impaired attorney cases, category 9, are closer to the conflict of interest cases than the *Strickland* cases and, therefore, a test similar to the conflict of interest test should apply to the substance impaired or mentally impaired attorney cases.

In the next two sections, this Article addresses the sleeping and impaired attorney situations and what standards should apply. Although there are not a lot of cases about impaired or sleeping attorneys, there are three different standards that have been applied by the courts. First, in the non-sleep impairment cases and in certain sleep cases, courts apply the standard *Strickland* two-prong test requiring deficient performance and prejudice.<sup>200</sup> Second, in sleeping cases, the Ninth Circuit finds *per se* prejudice in the situation where defense counsel sleeps during a "substantial portion of the trial."<sup>201</sup> Third, in sleeping cases, the Second Circuit finds *per se* prejudice if three requirements are satisfied: (1) counsel was unconscious; (2) for repeated and prolonged lapses; and (3) the defendant's interests were at stake during those times.<sup>202</sup>

As discussed above, there are two additional standards used in situations where ineffective assistance of counsel claims have been made. First, in situations that result in an actual or effective denial of the assistance of counsel, courts find constitutional error without a showing of prejudice. This standard applies when counsel is physically absent from a critical stage of the proceedings, surrounding circumstances prevent counsel from being able to adequately represent a defendant, counsel does not meet the substantive requirements for bar admission, counsel has a conflict of interest and an objection was made at trial, and counsel's performance is especially egregious, such as when counsel refuses to participate in the trial or concedes the cli-

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199. Technically, category 11, where an attorney makes no mistakes, does not require a showing of prejudice because the attorney is not ineffective if she makes no mistakes. I include this category in the *Strickland* group, however, because often courts do not address the issue of whether counsel made errors when they can resolve the question of ineffectiveness only by looking at whether the defendant was prejudiced by the alleged errors.

200. See, e.g., *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992).

201. See, e.g., *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984).

202. See, e.g., *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996).

ent's guilt. In all of these situations, a defendant is effectively without counsel, and "the process loses its character as a confrontation between adversaries."<sup>203</sup> Thus, prejudice is presumed.

Second, courts apply a different test when defense counsel has a conflict of interest and no objection was made at trial. Under *Cuyler*, if an actual conflict of interest exists that adversely impacts the defense lawyer's performance, prejudice is presumed.<sup>204</sup> To show "adverse impact," a defendant only needs to show there was a possible strategy that was in conflict with the attorney's other interests.

In discussing the proposed standards for the impaired attorney situations, one should keep in mind the factors considered by the Supreme Court in evaluating whether or not to use a *per se* prejudice rule:<sup>205</sup> (1) whether it would be especially difficult to measure the precise effect of errors on the defense;<sup>206</sup> (2) whether prejudice is so inherent in such a situation that it would be a waste of the court's time to do a case-by-case analysis;<sup>207</sup> (3) whether there has been such a breakdown in the judicial process that the defendant was effectively without counsel;<sup>208</sup> (4) whether the Sixth Amendment violation is easy to identify, and for that reason, because the prosecution is directly responsible, the violation is easy for the government to prevent;<sup>209</sup> (5) whether defense counsel is burdened by an actual conflict of interest;<sup>210</sup> and (6) whether the attorney errors can be defined with enough precision to inform attorneys what conduct to avoid.<sup>211</sup>

## B. Proposed Standard for Ineffective Assistance of Counsel Claims Involving Sleeping Counsel

The *Strickland* standard is based upon a presumption that counsel's conduct "falls within the wide range of reasonable professional

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203. *United States v. Cronin*, 466 U.S. 648, 656-57 (1984).

204. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980).

205. *See generally*, discussion *infra* Part III. In the cases where the courts use a *per se* prejudice rule, there is often no discussion about the deficient performance *Strickland* prong. The conduct giving rise to the presumption of prejudice, such as counsel's sleeping, appears to be enough to constitute deficient performance. Because the performance prong of the *Strickland* test includes a strong presumption that counsel's actions were within the "wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), courts should, and sometimes appear to, eliminate that presumption when counsel sleeps or is otherwise impaired. Thus, in cases where there is genuine attorney impairment, deficient performance should be found by the court. The difficult question is whether or not prejudice must be shown.

206. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

207. *Id.*

208. *Id.* *See generally* *Powell v. Alabama*, 287 U.S. 45 (1932).

209. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

210. *Id.*

211. *Id.* at 693.

assistance.”<sup>212</sup> The prejudice requirement is based upon the belief that “the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings.”<sup>213</sup> However, these foundations of the *Strickland* test do not apply where counsel is asleep.<sup>214</sup> The situation where counsel is asleep during a trial is more analogous to the situation where a defendant is without counsel than where a defendant claims that counsel acted improperly. During the time that counsel is asleep, a defendant is without counsel. A defendant cannot consult with a dozing attorney and an attorney who misses key testimony while asleep will not be able to adequately cross-examine witnesses.<sup>215</sup> Courts should presume prejudice when a defendant’s counsel sleeps, just as courts presume prejudice if counsel is absent, if counsel is not admitted to the bar, or if counsel is present but refuses to participate in the trial.

In addition to the similarity between sleeping counsel and no counsel, several of the factors courts consider in deciding not to require prejudice are present in situations involving sleeping counsel. In such situations, it is often difficult, if not impossible, to ascertain what prejudice a defendant suffered while counsel slept. The evil lies not in what counsel did, but in what counsel could have done had he or she been alert.<sup>216</sup> At some point, prejudice becomes inherent in the situation when counsel is dozing during the trial. Further, sleeping at trial is a deficiency that is clearly improper for counsel, and generally, the court will be aware of the sleeping and should take steps to remedy the problem.

Implicit in the *Strickland* presumptions is the difficulty in determining whether or not counsel’s actions were strategy decisions. However, where counsel is unconscious, counsel’s actions clearly are not strategy decisions. One of Justice Marshall’s general concerns about the *Strickland* test was: “The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.”<sup>217</sup> Where counsel is asleep, the difficulty of estimating prejudice can be insurmountable.

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212. *Id.* at 689. Although the main effect of this presumption is on the first prong of the *Strickland* test in determining the reasonableness of counsel’s conduct, the presumption underlies both prongs of the *Strickland* test.

213. *Id.* at 691-92.

214. “Of course, the buried assumption in our *Strickland* cases is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.” *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996).

215. See *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984).

216. See *id.* at 835. See also *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

217. *Strickland v. Washington*, 466 U.S. 668, 710 (1984)(Marshall, J., dissenting).

For example, if counsel sleeps through the testimony of a witness, it is difficult to judge what additional impact counsel's cross-examination would have had if counsel would have been conscious during the direct examination. Such prejudice can be shown in certain circumstances, and indeed must be shown for an ineffectiveness claim where a defendant claims that a non-sleeping counsel did not do a sufficiently vigorous cross-examination. Yet, it is a difficult burden to meet and such a difficult burden should not be placed upon an indigent defendant who was appointed sleepy counsel. A court would not allow defense counsel to be absent during direct examination of a witness because it is essential for a defendant's rights that counsel be present.<sup>218</sup> Similarly, there is no true distinction between counsel's absence when counsel is in another town and when counsel is in the Land of Nod.<sup>219</sup>

The *Strickland* test is a difficult one for a defendant to meet, and it is unfair for a defendant to have to make the difficult prejudice showing when she can show that, in effect, she had no counsel at all due to counsel's impairment. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."<sup>220</sup> As the Court in *Strickland* noted, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>221</sup> At some point, sleeping defense counsel undermines the proper functioning of the adversarial process. Therefore, a court should presume prejudice where defense counsel sleeps during trial.

Still, if a presumption of prejudice is to apply in sleeping attorney cases, there should be a threshold test. Prejudice should not be presumed where counsel's head bobs as if falling asleep for a brief mo-

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Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. . . . [I]t seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

*Id.*

218. See *Geders v. United States*, 425 U.S. 80 (1976)(reversing conviction where counsel not permitted to confer with client during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975)(reversing state conviction where state statute barred final summation by defense counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963)(counsel absent at trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961)(counsel absent at arraignment).

219. "[U]nconscious or sleeping counsel is equivalent to no counsel at all." *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984).

220. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

221. *Id.* at 686.

ment during the testimony of an unimportant witness. One test used by the lower courts is the Ninth Circuit *Javor* test, which allows a presumption of prejudice "when an attorney for a criminal defendant sleeps through a substantial portion of the trial."<sup>222</sup> This test was criticized by the Second Circuit because the *Javor* court did not explain what was meant by "substantial," which could refer to the length of time counsel slept, the significance of the proceedings, or the proportion of the proceedings missed.<sup>223</sup>

In *Tippins*, the Second Circuit instead presumed prejudice if "counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake."<sup>224</sup> The *Tippins* court, however, in an attempt to try to cure the vagueness of the *Javor* test, fashioned a test that is too rigid and will not adequately protect a defendant's right to a fair trial in all situations. The *Tippins* requirement that counsel be asleep for "repeated and prolonged" lapses does not adequately address situations where counsel only sleeps during the testimony of one key witness. The *Tippins* court's extended discussion of whether or not counsel was actually unconscious suited the facts of that case because testimony from several witnesses left no doubt that counsel was snoring, dropping his pen, and being awakened by his client.<sup>225</sup> Yet, in some situations a defendant will be effectively without counsel when counsel is repeatedly drifting in and out of sleep and perhaps does not appear completely unconscious to observers during a prolonged time.

While the *Javor* "substantial portion" test does not give specific guidance to courts, the *Tippins* test is too narrow. In fashioning its rule, the *Tippins* court did not give enough weight to the following passage it quoted from *Strickland*:

Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.<sup>226</sup>

By creating a strict rule requiring repeated and prolonged lapses of unconsciousness, the *Tippins* court failed to adequately address other situations where counsel's sleeping causes a "breakdown in the adversarial process." Although courts need more guidance than the *Javor*

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222. *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984).

223. *Tippins v. Walker*, 77 F.3d 682, 685 (2d Cir. 1996).

224. *Id.* at 687.

225. *Id.* at 688-89.

226. *Id.* at 687 (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)).

test, perhaps judges need more discretion than the *Tippins* test to adequately protect the right to a fair trial.

Courts should apply a refined version of the *Javor* and *Tippins* tests, presuming prejudice: (1) if counsel sleeps through a relatively large portion of the overall trial proceedings; (2) if counsel sleeps during a large amount of time; or (3) if counsel sleeps through specific critical portions of the trial. Because every case differs factually, courts should have some discretion in determining what constitutes "sleeping," although an attorney with her eyes closed should not automatically be found to be sleeping. This test will presume prejudice where counsel sleeps 10 minutes of a one-hour trial, where counsel sleeps several different times over a 30-day trial, and where counsel sleeps only during crucial portions of the testimony of the state's key witness. In each of these situations, a defendant was effectively without counsel.<sup>227</sup> Courts would find a Sixth Amendment violation in these cases if counsel were absent for the same amounts of time, and they should find such a violation if counsel is asleep. The *Javor* test probably would only presume prejudice in the first situation (where counsel slept during a "substantial portion" of the trial), while the *Tippins* test likely would only presume prejudice in the second situation ("where there were 'repeated and prolonged lapses'"). Prejudice, however, should be presumed in both situations, as well as the situation where counsel sleeps during critical portions of the trial.

The proposed test will not result in a rash of victories for defendants claiming ineffective assistance of counsel. First, the situation of sleeping counsel is, hopefully, rare. There are not many published cases involving sleeping counsel. One hopes this means there are not a lot of cases where counsel falls asleep during trial and, even in those few cases where counsel does doze off, one hopes the trial judges are capable of observing and remedying the situation—either by calling a recess or appointing new counsel before it becomes a problem of constitutional magnitude.

Second, the test is not especially easy for a defendant to meet. It is difficult for a defendant to pinpoint evidence of exactly how much overall time counsel slept or of exactly when counsel was sleeping. Unless someone is closely observing counsel during the trial, it will not be easy to pinpoint this information, except perhaps in the more extreme cases. In cases where a defendant cannot make enough showing that counsel slept, the *Strickland* test would apply.<sup>228</sup> Still, in

227. Additionally, as in the absence of counsel cases, harmless error analysis should not apply when the sleeping occurs during a "critical stage" of the proceedings. See *supra* note 94.

228. See *United States v. Petersen*, 777 F.2d at 484 (holding that where attorney had not been sleeping during a substantial portion of the trial, as required by *Javor*, the defendant has to show prejudice under *Strickland*).

those cases where a defendant can meet the burden to make a sufficient factual showing of sleeping in one or more of the three prongs of the proposed test, a court should not also require a defendant to show prejudice. If counsel sleeps during a large portion of the trial, during a large amount of time, or during the admission of critical evidence, the prosecution's case is not subjected to meaningful adversarial testing and a defendant is denied the constitutional right to effective assistance of counsel.

### C. Proposed Standard for Ineffective Assistance of Counsel Cases Involving Defense Attorneys Who are Intoxicated or Otherwise Substantially Mentally Impaired

In the continuum from no counsel to competent counsel, situations involving counsel who are impaired due to substance abuse or mental ailments are more analogous to situations involving attorneys with a conflict of interest than situations involving competent counsel with no impairments. Impaired attorneys, in fact, often effectively have a conflict of interest. For example, attorneys who are under the influence of drugs during a trial have a conflict of interest between their drug use and their responsibilities to their client. The abuse of drugs or alcohol during trial conflicts with counsel's duty to provide the best possible representation to the client.

The "evil" of allowing defendants to be represented by mentally impaired attorneys is similar to the evil of representation of conflicting interests. The evil

is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."<sup>229</sup>

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229. *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). *Strickland* also explained the reasoning behind the test for conflict of interest cases:

Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

*Strickland v. Washington*, 466 U.S. 668, 692 (1984). It may not always be apparent to the trial court that counsel is operating under a mental impairment, but it is also not always apparent to courts that counsel has a conflict of interest. However, in many situations, the trial court will be aware of counsel's impairment or impairments. See, e.g., *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (counsel was arrested for drunk driving during the trial and the trial judge made inquiry into the matter). Additionally, when counsel is appointed by the court for an indigent defendant, perhaps the court bears some responsibility for the situation.

For example, counsel's failure to seek out or accept a plea bargain does not constitute ineffective assistance of counsel without the difficult showing of prejudice.<sup>230</sup> However, the presumption of attorney competence should not prevail in a situation where, as in *Bellamy*,<sup>231</sup> defense counsel was mentally impaired and paranoid, and did not seek out a plea bargain for those reasons. The strong *Strickland* presumption that a trial is reliable should not apply when counsel has a mental impairment. There is a breakdown in the adversarial process when a defendant is represented by counsel who is drunk, who is impaired by drug abuse, or who has a substantial mental impairment that affects his or her ability to represent the client. Our system of justice should not allow a person who would be put in jail for drunk driving if that person were operating an automobile to stand before the court as an advocate for an indigent criminal defendant. In such a situation, the trial is unreliable, whether or not the defendant can make the difficult showing of prejudice.

Situations involving mentally impaired attorneys are more analogous to conflict of interest cases than to situations where *per se* prejudice rules apply, such as situations involving sleeping counsel or counsel whose conduct is especially egregious. In these latter situations, a criminal defendant is effectively without counsel. Depending on the degree of impairment, an impaired attorney is better than one who is unconscious or who refuses to participate in the trial. Like an attorney with a conflict of interest, a mentally impaired attorney is often able to operate at some lower level during the trial. Thus, a *per se* prejudice rule generally should not apply to situations involving mentally impaired counsel when the trial court was unaware of the situation.<sup>232</sup>

Because mental impairment cases are most like conflict of interest cases, a standard similar to the conflict of interest standard should apply to situations where a defendant is claiming ineffective assist-

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230. See, e.g., *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985) (holding that *Strickland* applies to ineffective claims regarding guilty pleas and finding that the petitioner in the case did not show prejudice resulting from counsel's advice regarding guilty plea); *Joubert v. Hopkins*, 75 F.3d 1232, 1248 (8th Cir. 1996) (holding that the petitioner failed to show prejudice resulting from lawyer's failure to inform him that the court would accept a conditional plea); *Clark v. Lewis*, 1 F.3d 814, 823 (9th Cir. 1993) (holding that petitioner failed to show he was prejudiced by counsel's alleged failure to advise him of possibility of a "no contest" or "*Alford*" plea).

231. *Bellamy v. Cogdell*, 974 F.2d 302, 308 (2d Cir. 1992).

232. Perhaps in some extreme situations, a mentally impaired attorney may be essentially unconscious. In such situations, a *per se* prejudice rule should apply. Also, in situations where counsel is obviously impaired and the situation has been highlighted to the trial court, but the judge makes no effort to remedy the situation, then perhaps a *per se* rule should apply as it does in conflict of interest cases where the trial court was aware of the conflict. See *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).



ance because defense counsel was mentally impaired. In cases where a defendant claims ineffective assistance of counsel due to counsel's conflict of interest and an objection was not made at trial, prejudice is presumed if the defendant shows that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."<sup>233</sup> For impairment cases where the trial court was unaware of the impairment, courts generally should apply the following rule: prejudice is presumed if the defendant shows: (1) counsel was operating under a substantial mental impairment; and (2) that impairment adversely affected the defense lawyer's performance.

Regarding the first prong of the proposed test, counsel's impairment must be substantial. If counsel has a hangover from a few drinks the night before or if counsel is taking mild prescription medication, the impairment is not substantial and prejudice should not be presumed. Keeping in mind *Strickland's* warning that mechanical rules should not apply in the area of ineffective assistance of counsel claims,<sup>234</sup> courts should have some leeway in defining "substantial impairment." Impairments, however, that are so severe they would result in an attorney being disbarred, should be considered as "substantial." Just as courts presume prejudice when the defense attorney does not meet the substantive requirements for admission to the bar,<sup>235</sup> prejudice should be presumed where an attorney's impairment would get him disbarred. Under the present state of the law, attorneys may be so impaired during trial that it contributes to their subsequent disbarment, but the defendant's conviction stands.<sup>236</sup>

The "adverse impact" requirement is similar to the requirement for conflict of interest cases. If a defendant shows that the "substantial impairment" affected the trial attorney's performance, then the defendant should not have to show prejudice, such as a showing that the impairment affected the outcome of the trial. The reason for not requiring a showing that the outcome would have been different is that the *Strickland* presumption of a fair trial should not apply where an attorney's performance was affected by a substantial impairment.

One argument against the proposed standard is that defendants will devote a lot of effort to investigating the personal lives of their trial attorneys instead of focusing on the outcome of the trial. There are three problems with this argument. First, such a concern should not override the constitutional right to a fair trial. "We must come to realize that the issue in effectiveness of counsel cases is not the culpa-

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233. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

234. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

235. See *supra* Part III.B.

236. See *Bellamy v. Cogdell*, 974 F.2d 302, 308 (2d Cir. 1992).

bility of the lawyer but the constitutional right of the client.”<sup>237</sup> Second, practically speaking, the proposed test will likely have little effect on a defendant’s investigation of a claim of ineffective assistance of counsel. Even under the *Strickland* standard, defendants investigate the personal lives of trial attorneys. Evidence that an attorney was drunk during trial, even if not resulting in *per se* prejudice, may still boost a claim that the attorney’s performance was deficient. Third, if attorneys are abusing drugs during trial or incompetent to be practicing law, they should be investigated, discovered, and encouraged to seek help. Courts should not be concerned about protecting fellow members of the bar at the ongoing expense of present and future defendants. Further, such investigations of attorneys’ private lives are often done for disciplinary reasons. If such investigations are relevant to the future ability to practice law, such investigations are even more relevant to the ability to practice law during the time period investigated.

Another argument against the proposed standard is that it may allow guilty defendants to go free who would not have been set free if they were required to show prejudice. However, under the proposed standard, in many of the cases discussed the outcome would still not be a finding of ineffective assistance of counsel. In many of the cases discussed, the courts found the attorneys were not impaired. It is only in cases where a defendant can actually show that counsel was impaired that the proposed standard will make a difference. Further, the remedy for ineffective assistance is a new trial. The defendant may be found guilty again with an unimpaired counsel.<sup>238</sup> Although one may argue that the new trial result is a waste of judicial resources, one must remember the overall goal of the Sixth and Fourteenth Amendments is ensuring that all are guaranteed a fair trial.<sup>239</sup> Because a trial with an intoxicated defense counsel is not a fair trial,

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237. Bazelon, *supra* note 76, at 25.

238. See generally, Sol Wachtler, *Crime and Punishment*, THE NEW YORKER, July 15, 1996, at 72. In this article, former Chief Judge of the New York State Court of Appeals, Sol Wachtler, notes that when a conviction is reversed based on the exclusionary rule, the new trial, more often than not, results in another conviction. *Id.* at 76. He reasons that the result is good because the next time the government will be more careful. *Id.*

239. See, e.g., Bazelon, *supra* note 74, at 28:

For example, when we reject an ineffectiveness of counsel claim because the inadequate representation was not prejudicial, we conceal a serious problem and nourish the mistaken euphoria that our systems for providing counsel to indigent defendants are alive and doing well. The cost of this concealment is paid in the loss of fairness to individual defendants and in the absence of guidance for lawyers in future cases.

Additionally, if appellate and post-conviction courts do reverse cases where attorneys were sleeping or otherwise impaired even where no prejudice has been shown, trial judges will be more likely to take actions to correct the problems of sleeping or impaired counsel at the trial level.

the burden should not be placed on the defendant to show how the outcome was affected by counsel's intoxication. The proposed standard still places a large burden on defendants while also protecting the constitutional right to a fair trial.

## VI. CONCLUSION

The right of an individual accused of a crime to have a lawyer stand by her side is one of the most important guarantees of our constitution. If a defendant is without counsel, many other constitutional rights become meaningless because the defendant and those rights have no champion in the courtroom. In order for the right to counsel to have meaning, the person representing the defendant must do more than just breathe. Counsel must act as a defender, and as the Supreme Court has noted since *Powell*, an attorney in the courtroom by itself is not enough to guarantee that the constitutional right to counsel has been fulfilled.<sup>240</sup> Even within the framework of the *Strickland* general presumption that counsel was competent, there are situations where that presumption should not apply and prejudice should be presumed.

The *Strickland* requirement of showing deficient performance and prejudice should not apply when counsel sleeps at trial. Although two circuit courts have developed two separate tests for determining when a prejudice showing does not have to be made where counsel slept, neither of those tests adequately address all situations. Instead, a court should presume prejudice (1) if counsel sleeps through a large portion of the overall trial proceedings; (2) if counsel sleeps during a large amount of time during trial; or (3) if counsel sleeps through specific critical portions of the trial.

In the right to counsel continuum, the situation where counsel is substantially mentally impaired, including impairment by drugs or alcohol, is analogous to situations where counsel acts under a conflict of interest. Thus, an ineffective assistance test similar to the conflict of interest test should apply when counsel has a mental impairment that was not discovered at trial. A court should presume prejudice if a defendant shows that (1) defense counsel was operating under a substantial mental impairment; and (2) that impairment adversely affected the defense lawyer's performance.

The *Strickland* requirement of showing prejudice is inapplicable when a defendant's trial counsel is asleep or mentally impaired. The foundation of the *Strickland* low threshold test for competency is the

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240. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

presumption that a defendant had a fair trial.<sup>241</sup> This foundation does not exist when a criminal defendant is represented by an attorney who sleeps or is drunk during the trial. In such situations, defendants are constructively denied the assistance of counsel.<sup>242</sup>

Hopefully, situations involving drunk or sleeping attorneys will be rare. However, in the few cases where those situations arise, the proposed standards adequately balance the concerns of avoiding unnecessary retrials and ensuring the guarantees of due process and the right to counsel. The proposed standards are not easy to meet. Often, it will be difficult to prove that counsel slept or that an attorney's drug use adversely affected that attorney's performance. Still, when those difficult showings are made, a defendant should not have the added burden of showing prejudice. Trial judges and prosecutors, as representatives of the state, should bear some responsibility in these situations.

Finally, defense attorneys play an important role in upholding the tenets of the Constitution and ensuring that the government obtains only fair convictions. Even if there were no prejudice in those situations, the community should not have confidence in a legal system where men and women are sent to prison or executed<sup>243</sup> when their attorneys slept during a key portion of the trial or when their attorneys were legally intoxicated during a critical portion of the trial. The constitutional right to counsel becomes meaningless when a defendant is represented by an attorney who is not even alert. Although, as the judge in Texas noted, the Constitution does not explicitly state that the defense lawyer has to be awake,<sup>244</sup> the constitutional right to counsel must be the right to competent, awake, and sober counsel.

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241. See *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)(citations omitted)(The prejudice component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.").

242. *Strickland v. Washington*, 466 U.S. 668, 692 (1984)("[A]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice").

243. For example, John Young was put to death by the State of Georgia on March 20, 1985. . . . Young's attorney, who was subsequently disbarred, was on drugs during Young's trial. The attorney was arrested on state and federal drug charges shortly after Young's trial, and he later claimed his attention was not focused on the trial because he was experiencing personal and family problems.

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 401 (1995). See also Bright, *supra* note 72, at 93 (A lawyer for Judy Haney "showed up so intoxicated one morning at trial that the judge had no choice except to send the jury away and lock the lawyer up for a day to dry out. The next morning he brought the jury back and produced both Ms. Haney and her lawyer from jail. A few days later, the death penalty was imposed.").

244. Katz, *supra* note 5, at 10 (quoting Judge Doug Shaver).